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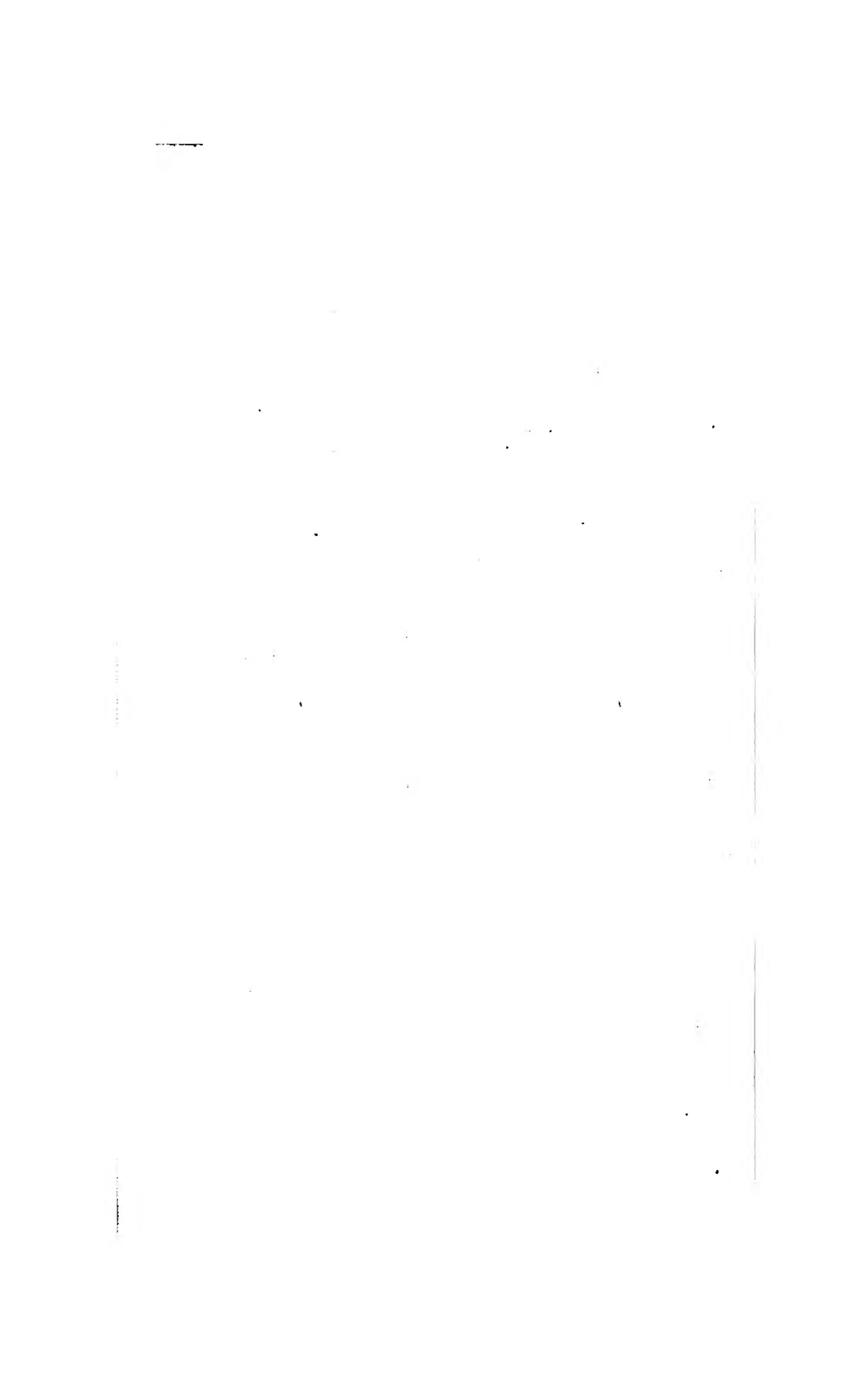
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A TREATISE  
ON THE  
MEASURE OF DAMAGES;  
OR, AN  
INQUIRY INTO THE PRINCIPLES  
WHICH GOVERN THE  
AMOUNT OF COMPENSATION  
RECOVERED IN SUITS AT LAW.

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*"Cum pro eo quod interest dubitationes antiquae in infinitum productae sint, melius nobis visum  
est, hujusmodi prolixitatem, prout possibile est, in angustum coarctare."*  
*Cod. De sent. quae pro eo quod int. prof., Lib. VII, Tit. XLVII.*

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BY  
THEODORE SEDGWICK.

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DANIEL LORD, ESQ.

DEAR SIR:—

IF you find no fault, I am very sure that I shall not be elsewhere censured for placing your name (although without any previous permission), upon the dedication-page of this work.

Your opinion of the importance of the subject, is one of the circumstances that have most strongly urged me to proceed with it. But I have other reasons for requesting you to accept this volume.

You show us all, by a teaching far better than barren precept, how much true dignity and usefulness, as well, if we may be allowed to judge, as real happiness, attend a life assiduously, intelligently, and, above all, honorably devoted to that profession of which we are the votaries.

I am, dear Sir,

With sincere regard and respect,

Your obedient servant,

THEODORE SEDGWICK.

*New York, January, 1847.*





# PREFACE

TO

## SECOND EDITION.

---

IN preparing the Second Edition of this work for the press, I have done all in my power to show my sense of the favorable manner in which it has been received, and to increase its utility. I have examined the numerous volumes of Reports which have appeared both in England and this country, and have availed myself, as far as possible, of the increased attention which has been latterly paid to the subject. This has led not only to a great increase of matter, but to changes so considerable in the arrangement of the work, that I have found it impossible to preserve the original paging. The two last chapters are entirely new.

The principal difficulty which I encountered in preparing the first edition—the difficulty of adapting any scientific arrangement of the rules of compensation to the technical forms of action of the common law—has been somewhat increased by the great changes that have been introduced into legal proceedings within the last few years. New York, and several of the sister States, have adopted a system of pleading which amounts to a total subversion of the common law procedure; and Massachusetts has made very serious innovations on it. We are evidently in the midst of a revolution which, in our

own time, will not only efface most of the distinctions between law and equity, but will completely sweep away the common law so far as its forms of proceeding are concerned, and in so doing work a change in the administration of justice, far more complete than was ever before effected in so short a period. Our example and influence are already making themselves felt in England; and the alterations there, though perhaps they will be more cautiously made, bid fair to be not much less sweeping.

Convinced, as I have long been, that these changes—although attended by the evils which always wait upon great and sudden modifications of existing arrangements, evils aggravated in this case in our country by our tendency to act rather with energy and vigor than with caution and deliberation—still, that these changes will finally establish our jurisprudence on a basis more intelligible, more harmonious, more beneficial, I cannot in any sense regret their introduction.

For the time being, however, in regard to the order and arrangement of this work, I have felt the full inconvenience resulting from the present chaotic state of our procedure. I have endeavored to avoid it as far as possible by keeping steadily in view what is manifestly the inevitable result of the experiments now going on, viz.; the final and total abrogation of the forms of the common law both in England and America. When that end is at length attained, and when the application for redress shall be made to depend solely on the right, then, and not till then, it will be easy to classify and arrange the rules governing the measure of relief in a manner that shall be at once legal and logical; that shall satisfy the technical demands of the mere practitioner, and at the same time gratify that love of reason and justice which animates the mind of him who desires to find something in the law besides a mere collection of abstract and arbitrary rules.

NEW YORK, July, 1852.

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**A TREATISE**  
**ON THE**  
**MEASURE OF DAMAGES.**



## INTRODUCTION.

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THE only work which our libraries contain on the subject of the Rule or Measure of Damages, is that by Sayer,\* published in the last century; it covers, however, but a very small portion of the ground now embraced by this branch of the law, and is of scarcely any value to the American student.† No serious attempt seems indeed to have been made to reduce the rule of damages to principle, till a comparatively recent period. Lord Kaimes says, in his Principles of Equity: "In the English courts of common law, there is no accurate distinction made between damage certain and uncertain. Damages are taxed by the jury, who give such damages, as in conscience they think sufficient to make up the loss, without regarding any precise rule."‡ This was written less than a century ago. In an action for an escape, tried in 1776, Lord Ch. J. Wilmot said, "in actions on the case the damages are totally uncertain and at large."§ It is almost superfluous to say, that no such arbitrary discretion is now tolerated, except in a very limited class of cases, if, indeed, it can be properly said to exist at all.]

The tribunals of justice, both in England and America, have for some time assiduously labored to reduce this branch of our

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\* The Law of Damages, by Joseph Sayer, Serjeant at Law, London, 1770.

† The second volume of Mr. Greenleaf's excellent work on Evidence, p. 209, contains a chapter on Damages, in which will be found far the best view of the subject that has ever yet been taken, but the space allotted to it forbade anything but a rapid and general survey.

‡ 2d edition, 1767, p. 78, in notes.

§ Ravenscroft vs. Eyles, 2 Wils, 295.

] "It is desirable," says the Supreme Court of Massachusetts, "to have as definite and precise rules upon the subject of damages as are practicable."—Batchelder vs. Sturgis, 8 Cush., 201. "A proper administration of justice," says the Supreme Court of Louisiana, "requires that the rules established by law for the assessment of damages, should be adhered to."—*Arrowsmith vs. Gordon*; 8 La. Ann. R., 105.

law to fixed rules ; and in the present condition of our jurisprudence it may be considered surprising that the subject has not received more attention from our text writers.

The amount of Damages, or, in other words, the pecuniary compensation awarded by tribunals of justice, in the widest acceptation of the term, embraces almost the whole field of legal redress ; and a treatise on the subject of the rules which govern the amount of damages, if considered in their largest and most general sense, would include nearly the entire philosophy of the Law. I use here the term Law, in contradistinction to Equity. In taking a broad and general view of the matter of damages, we should necessarily be led to consider questions which lie at the very basis of our system of jurisprudence ; to what extent compensation ought on principle to be carried ; whether full and complete remuneration should be provided for every case of civil injury ; or whether, as now, the reparation should be confined within much narrower limits. Again, for what particular wrongs reparation should be provided. Should the crime of seduction be punished by a civil action founded on a fiction of service ? Should the injured husband have compensation in an action for criminal conversation ? In what cases should redress be furnished for slanderous or libellous publications ? Ought the malicious refusal to fulfill contracts for the mere payment of money be more severely punished than honest incapacity ? Should there be any reparation for a frivolous and vexatious suit beyond the costs, or should further redress, as now, be confined to cases of malicious prosecution ? Should a merely false representation as to the credit of a third party, be allowed to be made with impunity, or should it be necessary, as now, to show also a fraudulent intent ? In what cases should provision be made for the counsel fees of the prevailing party ?

These and similar inquiries would, as I say, embrace almost the whole philosophy of legal relief. But I have by no means in this volume intended to occupy ground so extensive, or to discuss questions so theoretical. My aim has been more limited ; and if much humbler, at least I hope more practically useful.

My purpose has been to examine those cases only, where a wrong having been done, or, in technical language, a right of

action existing, the question remains, What is the amount of compensation to be awarded? In other words, what is the rule or measure of damages in courts of law?

In doing this, my principal purpose has been, to present the law as it is; while, at the same time, I have thought it my duty to exhibit the contradictions and discrepancies which exist in this, as indeed in almost every part of our jurisprudence; and which must exist, so long as those changes take place in the administration of justice, which sometimes furnish a theme for well-grounded censure, but more frequently exhibit its capacity of self-adaptation to the perpetual fluctuations of our social and commercial condition.

In preparing the work, my chief embarrassment has arisen from the difficulty of making a proper and scientific division of the subject. The whole arrangement of our Anglo-American jurisprudence; the primary distinction between law and equity; and the subordinate divisions of the forms of action at law are so purely arbitrary and technical, that it is almost impossible to prepare a treatise on a subject as extensive as that of the measure of damages, which shall be at once useful and logically arranged. To be useful, it must, to a very considerable extent, at all events, conform to those arbitrary divisions which are altogether independent of any scientific analysis, and very frequently in direct conflict with logical order. Conscious of the difficulty, yet seeing no mode to avoid it altogether, I have endeavored, as far as possible, to make my treatment of the subject correspond with that which Blackstone originally adopted, and which subsequent writers on our law have generally followed.

I have again been embarrassed by the extent of the subject. There is a very evident distinction between the cause of action and the measure of damages; in other words, between the right of recovery and the amount of compensation; and yet as most actions at law result in damages, it is by no means easy in all cases to define what properly belongs to each. "The rules on the subject of damages," says one of the great French civilians, with his usual clearness, "regard either whether they are due at all, or of what they consist. The first question is one of law, which depends on whether the party charged is liable or not. This being determined, the second question remains; namely,



to discriminate, with regard to the damages sustained, between that portion which is to be made good and that which is to be borne by the sufferer.”\*

This division, very clear and simple in theory, it will not always be found easy to reduce to practice.

Another source of difficulty has arisen from the fact that some parts of the subject have been already treated with great fullness and ability. Benecke's and Stevens's works on indemnity and average exhaust that branch of the law of damages which relates to insurance. The various books on Set-off, among which is Mr. Barbour's valuable treatise, and the late Mr. Graham's work on New Trials, equally cover the whole subject so far as they go. And where I have found the ground thus occupied, I have contented myself with a very general survey.

In preparing the work I have endeavored, as far as possible, to extract some general and reasonable rule, from cases often conflicting and discrepant; but as the subject, in any connected form, is almost entirely new, I have thought that I should best serve the bar, and at the same time most efficiently contribute to a generalization of the whole matter, by giving the decisions sufficiently at large to show the principle which they seek to establish, instead of contenting myself with a brief reference. This course may undoubtedly, in some cases, lead to prolixity; but it seems to me to be attended by more than counter-balancing benefits.

Our law is so truly to be found in our reports, that it seems to me always better to give the very words of judicial opinions, than to attempt to put them in different language. In regard to the subject of damages, too, this course has seemed to me particularly expedient. It is in the course of a trial, that questions of this class generally present themselves; and while I have endeavored to clear the way to a correct appreciation of

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\* “Toutes les regles de la matiere des dommages et interets regardent, ou la question de scavoir s'il en est dû, ou celle de scavoir en quoi ils consistent. La question s'il est dû des dommages et interets est toujours une question de droit qui depend de scavoir si celui a qui on les impute doit en etre tenu. \* \* Cette premiere question de scavoirs'il est dû des dommages et interets étant décidée, c'en est une seconde, de scavoir en quoi ils consistent, c'est a dire de discerner dans toute l'étendue du dommage qui est arrivé ce qui doit en etre imputé a celui qui est obligé de dedommager, et ce qui ne doit pas lui etre imputé.”—*Domat, Loix Civiles, Lec. III., Tit. 5, Sec. II., § 2.*

the whole subject, my especial object has been to make a work which should be practically useful at nisi prius.

I have found another reason for this course, in the unsettled state of this branch of the law. The contradictions are so numerous, the discrepancies so great, and the subject, in a connected shape, so new, that I have hesitated to affirm any position, without citing my authority at large. And in collating the decisions, I have found so much variance of opinion in the numerous tribunals which follow the course of the common law, that it is with great difficulty, in many cases, that I have been able to do more than state the doubts as they exist.

I have endeavored to point out the analogies of this branch of the science, not only in our own system, but by going back to the great original of jurisprudence, the civil law, and also by reference to the more eminent judicial writers of France; and I can only wish that I had leisure to make this part of the work more full and complete. I have had constantly in my mind the precept and example of the late lamented Story;\* but no one can be more sensible than myself of the immense disparity between the models of the master and the efforts of the pupil.

I suggest these various considerations by way of an anticipated excuse for the many errors and imperfections which I am but too sensible this work must present, and I throw myself upon the candid and indulgent consideration of a very learned and able profession.†

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\* "There is a remarkable difference, in the manner of treating juridical subjects, between the foreign and the English jurists. The former almost universally discuss every subject with an elaborate theoretical fullness and accuracy, and ascend to the elementary principles of each particular branch of the science. The latter, with a few exceptions, write *practical* treatises, which contain little more than a collection of the principles laid down in the adjudged cases, with scarcely an attempt to illustrate them by any general reasoning, or even to follow them out into collateral consequences. In short, these treatises are little more than full indexes to the reports, arranged under the appropriate heads; and the materials are often tied together by very slender threads of connection. They are better adapted to those to whom the science is familiar, than to instruct others in its elements. It appears to me that the union of these two plans would be a great improvement in our law treatises, and would afford no inconsiderable assistance to students in mastering the higher branches of their profession."—*Story, Pref. to Com. on Bailments.*

† A serious difficulty has arisen from the fact that the digests of the reports afford but little aid. There is, I believe, in no one of them any such head as "*Rule or Measure of Damages.*" Wharton's *Pennsylvania Digest*, (Ed. 1836,) has not even any head of "*Damages*;" and Harrison's, the most complete of all, has, under the head of "*Damages*," only a very inconsiderable number of *cases*. It has been necessary, there-

I do not at all flatter myself with the hope of complete success. But if this volume tend in any degree to reduce to greater certainty this department of our jurisprudence—to stimulate the inquiries, or to abridge the toil of those who painfully devote themselves to the great science of justice—my labor will be abundantly repaid.\*

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fore, to go through the index to each volume of reports separately, which, considering our *multorum camelorum onus*, is not a holiday task. I hope our reporters and digesters may hereafter think it not improper to reserve one head for the Rule or Measure of Damages.

\* I think I cannot err in subjoining here an extract from a letter written by the late Mr. Justice Story, stating his opinion of the value of a work like the present, if properly executed.

Cambridge, November 7, 1844.

MY DEAR SIR:

In reply to your letter I beg to say, that I think a book on the Law and Rules of Damages would be of great utility to the profession, and would supply a deficiency which is constantly felt and lamented. I know of no book that treats of the subject at once fully, accurately, and with suitable distinctions and expositions of principles. The authorities, either in England or America, are not in entire harmony with each other; and different States have apparently adopted different rules in the same class of cases. We want a thorough analysis of the whole subject, with all the lights of the modern authorities.

JOSEPH STORY.

## CHAPTER I.

### GENERAL VIEW OF THE SUBJECT.

Distinction between Common Law and Equity, as to the relief given.—Origin of damages.—Different principles on which different systems of jurisprudence act in awarding damages.—That of the English and American systems is Compensation.—Nature and extent of this compensation generally.—Difficulties arising from the Forms of action.

THE subjects of legal investigation, when practically considered, generally resolve themselves into three great heads of inquiry; the right of the parties or the cause of action, the forms of proceeding, and the mode of relief. It is of the last only of these three divisions, that these pages are intended to treat; nor are they intended to discuss the whole topic of redress; on the contrary, they will be confined to a single branch of this extensive subject.

The relief afforded by a tribunal, may be either preventive or remedial. If remedial it may again be either specific, or it may consist in the mere award of pecuniary remuneration.

The Common Law, as it exists in England and in the United States, is generally remedial in its character, and its remedies are of a pecuniary description. It has few preventive powers; it can rarely compel the performance of contracts specifically; its relief, for the most part, consists in the award of pecuniary damages. Whether it punishes wrongs, or remunerates for breach of contract, in either case its judgment simply makes compensation, by awarding damages to the sufferer.\*

The rules which in this matter govern its action, the amount of compensation awarded by Common Law tribunals, or, in

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\* And all the questions growing out of these subjects are investigated in one and the same proceeding. "It is incident to every Common Law complaint of injury and damage, that the existence of the injury, the right to compensation, and the amount of damage alleged to have been sustained, are tried and decided in one proceeding and upon one trial."—*East and West India Docks vs. Gatlke*; 15 Jur., 261.

other words, the Measure of Damages will be the subject of this treatise.

A mere enumeration of the forms of action and proceedings at common law, is sufficient to show that the powers of these tribunals are almost solely remedial, and confined, with few exceptions, to the infliction of pecuniary damages.

Equity operates by injunction; it restrains the aggressor from the contemplated violation of right; it gives specific relief by decreeing the very thing to be done which was agreed to be done; it compels the unwilling party to give testimony; it executes trusts, expounds testaments, and adapts its plastic hand with ease, to the varied wants and complaints of man in a state of society. But, as a general rule, it refrains from awarding pecuniary reparation for damage sustained.\*

With the Common Law the case is very different. The end at which it arrives is, in almost all instances, one and the same; in the actions founded upon contract, account, assumpsit, covenant, debt, the only object of the plaintiff is to obtain, and the only power of the court is to make a judgment awarding a certain amount of money, by way of redress for the breach of the agreement. In the case of an action brought for the breach of a contract for the payment of money only, a suit for damages does, indeed, as Lord Mansfield has observed,† from the nature of the case, become a *suit for specific performance*. But this is almost the only instance where a suit at law compels the very thing to be done which the defendant agreed to do.

In the actions of tort, case and trespass, trover, replevin and detinue, the rule is the same, with the exception that in the two latter the law makes a feeble and partial attempt to enforce the return of the specific chattels, for the taking or detention of which, the suit is brought.

To this general rule, however, there are some further exceptions, which must be borne in mind.

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\* It is true, that a Court of Equity will sometimes give damages in lieu of the specific performance of a contract, but that is only, as a general rule, where it has obtained jurisdiction of the cause on other grounds.—*Wiseall vs. McGown*, 2 Barb. S. C. E., 270.

† *Robinson vs. Bland*, 2 Burr. 1077, 1086.—“Where *assumpsit* proceeds on a demand of money, it is in truth and substance, and so taken in some of the cases a more special action of Debt; for where the demand is for the payment of a sum of money, it is a technical fiction to call the sum recovered *Damages*; it is the specific debt, and the jury give the specific thing demanded.”—*Lord Loughborough in Rudder vs. Price*, 1 H. Bl., 547.

In the action of ejectment, and in the proceedings to recover dower, as well as in cases of nuisance by abating the grievance complained of, the common law gives a specific remedy. By the proceedings of *quo warranto*, *mandamus* and *prohibition*,\* and the great writ of *habeas corpus* also, these tribunals exercise powers very analogous to those of a court of equity. But of these, so far as they belong to our subject, more particularly hereafter.

Blackstone, in his Commentaries, ranks damages among that "species of property that is acquired and lost by suit and judgment at law." "The primary right to a satisfaction for injuries, is given by the law of nature, and the suit is only the means of ascertaining and recovering that satisfaction." "The injured party has unquestionably a vague and indeterminate right to some damages or other, the instant he receives the injury, and the verdict of the jurors, and the judgment of the court thereupon, do not, in this case, so properly vest a new title in him, as fix and ascertain the old one. They do not give, but define the right."†

It is of the rules which govern this species of property that I propose to treat in this volume, under the name of the Measure of Damages; and I arrange the subject in an order of which the following is a general outline. The origin of Damages under the English system, and the Tribunals by which they are now imposed. The general principles by which they are regulated. The Measure of Damages in particular cases. Set-off, Recoupment and Mitigation, of Damages. The rule of Damages under special statutes. The control exercised by the Court over the Jury in regard to Damages. Pleading, Practice and Evidence, as applicable to the subject.

In investigating the origin of our present system of pecuniary compensation, it is not difficult to trace it back to those Anglo-Saxons, whose marked and peculiar character has so deeply impressed itself on every quarter of the globe.

Under the civil law we shall see hereafter that the rights and remedies of the subjects of the Imperial Government of Rome, were carefully protected in regard to the matters of which we now speak. But when that beautiful and elaborate

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\* And the ancient and now obsolete writ of *estrepement*.

† Book II., chap. 29, p. 438.

structure shared the fate of its creators, the rules of right sank with it, and the law but slowly emerged from the wreck and chaos of empire. For nearly ten centuries the intellectual progress of Europe was arrested, or retarded, and during that period the earlier processes of civilization had necessarily to be worked out anew.

English jurisprudence finds its earliest monument in the sixth century, in the laws of Ethelbert, king of Kent; and this code known as *Leges Æthelbirhti* illustrates our present subject too curiously to be unnoticed here.

In this code we find the attention of the law giver confined almost exclusively to wrongs, or, as we would now say, to actions of tort; and the *Were*, *Weregildum*, or *Weregild*, literally a man's money, or the price of a man, is the earliest award of damages to be found in our jurisprudence. The antiquity of compositions for murder is illustrated by Homer, where, in the description of the shield of Achilles, two disputants are represented wrangling before the judge for the weregild or price of blood, *εἰνεκα ποινης ανδρος αποφθιμενου*.\*

"The passion of revenge," says Mr. Hallam, "always among the most ungovernable in human nature, acts with such violence upon barbarians that it is utterly beyond the control of their imperfect arrangements of polity. It seems to them no part of the social compact to sacrifice the privileges which nature has placed in the arm of valor. Gradually, however, these fiercer feelings are blunted, and another passion, hardly less powerful than resentment, is brought to play in a contrary direction. The earlier object of jurisprudence is to establish a fixed atonement for injuries, as much for the preservation of tranquility as the prevention of crime. Such were the weregilds of the Barbaric Codes."†

"Damages," says Sir Francis Palgrave, "recovered in a civil action for an assault, or any personal injury not being a felonious act, correspond to the Anglo-Saxon *Were*. When

\* Hallam's *Middle Ages*, Vol. I., p. 154, Chap. II., Part II.

† Hallam *ut Supra*. "La Composition," says Guizot, "est le premier pas de la legislation criminelle hors du regime de la vengeance personnelle. \* \* La composition est une tentative pour substituer un regime legal a la guerre; c'est la faculte donnee a l'offenseur de se mettre, en payant une certaine somme a l'abri de la vengeance de l'offensé; elle impose a l'offensé l'obligation de renoncer a l'emploi de la force."—*Hist. de la Civilization en France*, Tome 1, pp. 275 and 276.

Alfred enacts that the seduction of the wife of a Twelf Hændman, or an Eorl, is to be compensated by payment of one hundred and twenty shillings; of the wife of a Six Hændman, by payment of an hundred shillings; and of the wife of a Ceorl, by payment of forty shillings; he does nothing more whatever, than fix and declare the amount of the verdict, instead of leaving the assessment of damages, as we do, to the direction of the judge and the discretion of the jury.”\*

The *Were* is not to be confounded with the *Wite*, the one answering to our civil damages for personal trespasses,† the other to our criminal mulct or fine. It is to both the *were* and the *wite* that Tacitus refers; when speaking of the Germans, he says: “*Sed et levioribus delictis pro modo pœna; equorum pecorumque numero convicti multantur, pars multas regi vel civitati, pars ipsi qui vindicatur, vel propinquis ejus exsolvitur.*”‡

It is a curious fact, that the laws of remote and barbarous periods, show the most minute care in fixing the amount of compensation to be recovered by way of damages.

We have the laws of twelve Anglo-Saxon monarchs, from the middle of the sixth century to the Norman conquest. Of these, the earliest, as I have said, are those of Ethelbert, in the latter part of the sixth century; and his application of the *Were*, or, in other words, his rule of damages, is singularly minute.

“If the hair be plucked, or pulled, let fifty sceattas§ be paid

\* Palgrave's *Rise and Progress of the English Commonwealth*, Vol. I., pp. 205 and 82.

† “The *Wite* was a penalty paid to the crown by a murderer. The *Were* was the fine a murderer had to pay to the family, or relatives of the deceased, and the *Wite* was the fine paid to the magistrate who presided over the district where the murder was perpetrated. Thus the *Wite* was the satisfaction to be rendered to the community for the public wrong which had been committed, as the *Were* was to the family for their private injury.”—*Bosworth's Anglo-Saxon Dictionary*, in *voc.* *Were* and *Wite*. Dr. Lappenberg, in his history of England under the Anglo-Saxon Kings, (see B. Thorpe's Translation, London, 1845, Vol. II., p. 886, *Particular and Penal Laws*,) mentions several other fines imposed, besides the *Were* and the *Wite*, in cases of homicide. He says: “The relations of the slain received the whole *werigild* annexed to his rank in the community.” “Previously to paying the *werigild*, the king's *mund*, a fine to the king, for the breach of his protection was to be levied—after which, within twenty-one days, the *healsfang*, (apprehensio colli, collistrigium,) a mulct in commutation of the pillory, or some similar punishment, was to be discharged, and after that, within twenty-one days, the *mandot*, or indemnity to the Lord of the slain for the loss of his man. In addition to all these, there was still the *fyht wite*, due to the crown for the breach of the peace, which, as well as the *mandot*, could never be remitted.”

‡ De Moribus, c. 12. Palgrave, I., p. 99.

§ A silver coin, weight 19 gr. Vide Hawkins's *English Silver Coins*, p. 18.



in compensation. If the scalp be cut to the bone [of the skull] so that the latter appear, let compensation be made by payment of three shillings.

If an ear be cut off, let compensation be made by payment of twelve shillings.

If a piece of the ear be cut off, let compensation be made by payment of six shillings.

Whoever fractures the chin bone, let him forfeit twenty shillings for the offence.

For each of the front teeth, six shillings.

For the tooth that stands by the front teeth, (on either side,) four shillings.

For every [finger] nail, one shilling.

If the great toe be cut off, let a fine of ten shillings be incurred.

If the great toe nail be cut off, let thirty sceattas be paid for compensation. For every other toe nail, ten sceattas.\*

It will be noticed that the Were or damages in the laws of Ethelbert, is assessed in money. But, says Sir Francis Palgrave, "until a metallic currency was introduced, the legal fines and penalties were paid in kind: in the laws of Hoel Dda all such fines are reckoned in cattle, and the same mode of computation prevails in the *Brehon* laws of Ireland, and the '*Assythments for Slaught*er' of the Scots. An intermediate stage is denoted by the laws of the Continental Saxons. Their weres are fixed in *solidi*, or shillings. But the *solidus* was an imaginary denomination; and instead of counting down the coin, the offending party might drive his legal tender into the farm of the plaintiff. An ox passing sixteen months old, represented the greater solidus; the lesser solidus was a yearling ox, or a ewe and her lamb. Amongst some Saxon tribes, the solidus was reckoned in corn; thirty bushels of oats, forty of rye, and sixty

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\* I have taken the above extract from Sir Francis Palgrave, Vol. II., page CVII. The last Latin translation of the Anglo-Saxon laws was by Wilkins, in 1721. The recent Record Commission, among its most valuable and important labors in the field of early English jurisprudence, have published, under the direction of Mr. Thorpe, the first English translation of these curious codes. The history of no part of the law should be written without giving them a careful examination.

Besides the folio edition of the Anglo-Saxon laws, published by the Record Commission, there is an edition in two volumes, 8vo., which I have now before me; the translation of the passage above is substantially the same as that of Palgrave, with the exception that, in the former, "*Bote*" is used for its equivalent "*compensation*."

of wheat, being each its equivalent; and it is most probable that the necessity of adjusting the ancient fines to the standard of Roman Britain, was the cause which produced the enactment of the Kentish laws.\* "The coined money in England," says Mr. Serjeant Heywood, speaking of the Saxon period, "was so trifling in quantity, that most of the transactions of commerce, and all buying and selling, were carried on by barter, and cattle obtained the name of *Viva pecunia*, from being received as money upon most occasions, at certain regulated prices."†

\* Palgrave's History, Vol. I., p. 44.

† The Ranks of the People under the Anglo-Saxon Government, by Samuel Heywood, Serjeant, Introd., p. lii. "*In Wera reddere poterit quis*," says the law of the Conqueror, § 10, "*equum non castratum pro XX. solidis, et taurum pro X. solidis, et junctum pro V. solidis*." And see Lex Saxonum, Tit. XVIII. De Solidis. As to the value of the *Solidus*, Gibbon says: "Till the twelfth century we may support the clear account of twelve *denarii*, or pence, to the *solidus*, or shilling, and twenty *solidi* to the pound weight of silver, about the Pound Sterling. Our money is diminished to a third, and the French to a fifteenth of this primitive standard." *Hist. Ch.* 58, note.

The use of cattle as a measure of value is of very great antiquity,—thus Homer:

The third bold game Achilles next demands,  
And calls the wrestlers to the level sands;  
A massy tripod for the victor lies,  
Of twice six oxen, its reputed price;  
And next, the losers' spirits to restore,  
A female captive, valued but at four.

*Iliad*, Book 28, 1, 815.

It seems probable that money became the general measure of value in England not long after the Norman Conquest.

The old feudal services were all originally rendered in kind; the reliefs in horses and arms—military service in person. But in the reign of Henry II., "the humour of the times being," says Mr. Sullivan, "that every thing should be paid in money," (Lectures on the Laws of England, Lect. 81, p. 290,) the reliefs were commuted for a specific sum, and personal service was exchanged by the same king for escuage and scutage, and the same thing took place in regard to rents; (p. 288 and 289.) See also Heywood on Ranks.

The civilized Romans recognized the metallic currency as the measure of value; *qui non facit quod promisit, in pecuniam numeratam condemnatur, sicut evenit in omnibus faciendi obligationibus*. L. 18 in f. ff: de re: judic; and says Domat, Vol. I., p. 271, *Des Interets*; "*L'argent tient lieu de toutes les choses qu'on peut estimer*." Liv. III., Tit. V., § II.

The laws of the Saxons, and those of Hoel Dda, both noticed in the above extract from Sir Francis Palgrave, may not be without sufficient interest in connection with our present subject to permit a brief note. The date of the *Leges Saxonum et Frisionum* has been the subject of great controversy among the antiquarians; [See A Historical Treatise on Trial by Jury, Wager of Law, &c., by Thorl Gudm. Repp. Edinburgh, 1882, p. 28;] some ascribing them to Charlemagne, and others to Harold Blue Tooth of Denmark, whose reign closed A. D. 984. The latter opinion would seem the better; in either case, these laws are of interest to the scholar of English jurisprudence, as they at all events belong to the same race, from which our ancestors sprang, although

The laws of the Anglo-Saxon monarchs which we have from the period of Ethelbert of Kent, to the Norman Conquest, contain all, more or less, the application of the *Were*, but in none,

after they had left the parent land. Nothing can exceed the simplicity and brevity of these codes.

In Christi nomine incipit Legis Saxonum, Liber de Vulneribus.

1. De ictu nobilis solid. XXX. vel si negat, tertia manu juret.
2. Livor et Tumor LX. solid. vel sexta manu juret.
3. Si sanguinat eum CXX. solid. vel cum undecim juret.
4. Si os paruerit CLXXX. solid. vel cum undecim juret.
7. Si per capillos alium comprehenderit, CXX. solid. componat vel XII. a manu juret.

The two bodies of law, the *Lex Saxonum* and the *Lex Frisionum* may be found at length in the *Codex Legum Antiquarum* of Lindenbrog, a curious collection of the legislation of the middle ages.

Hoel, or Howell Dda, Howell the Good, was a King of South Wales in the 10th century—the date of his compilation, which consists of three codes, the Venedotian, Dimetian, and Gwentian, is between 914 and 942, and it appears that laws of a similar character are traceable as far back as the 6th century. The republication of these statutes forms one of the great labors of the Record Commission. These laws exhibit the most minute particularity in the estimation of damages. They speak of various sorts of compensation for,

I. *Saraad*, or a disgrace.

II. *Galanas*, or murder.

And these terms, *saraad* and *galanas*, are also used for the mulct imposed for the offence or crime. There were also two other fines; the *Dirwy*, (from Dir, force) a fine of twelve kine, or three pounds; and *Camlwro*, a fine of three kine, or nine score pence.

The following extracts illustrate this legislation. Venedotian Code, p. 115.

§ 27. In three ways *Saraad* occurs to every person in the world; by striking, assaulting, and taking by violence from him; and if it be a man, if his wife be violated, it is *saraad* to him; if it be a woman, if she find another woman with her husband, it is *saraad* to her; and so nobody escapes without being subject to *saraad*.—

§ 27. The *Galanas* of a steward, a chief of a kindred, a canghellor, and a chief huntsman, is nine score and nine kine, once augmented; and the *saraad* is nine kine and nine score of silver, once augmented.—

P. 108, § 12. A *dirwy* is due for fighting; fighting is assault and battery, and blood and wounds—the three things that constitute fighting; and therefore it is right to pay *dirwy* for them. The amount of the *dirwy* is twelve kine, or three pounds; the amount of the *camlwro* is three kine, or nine score pence.—

P. 125, § 88. For a dog, or for a bird, or for any thing of that kind, there is neither *dirwy* nor forfeiture of life; but *camlwro* to the lord, and amends to the owner of the property.—

P. 137. Of the worth of fowls.

1. A hen is one penny in value.
2. A cock is two hens in value.—

P. 140. Of skins this treats.

1. The skin of an ox is eight pence in value.
2. The skin of a hart, eight pence.—

P. 141. Of the worth of trees this treats.

1. The worth of an oak, six score pence.
2. The worth of a knurled oak, on which there is no fruit, four legal pence.—

P. 142 Here Iowerth, the son of Madog, son of Raawd, saw it to be expedient to

with the exception of those of Alfred, between A. D. 871 and 901, do we find the same minute classification of wrongs and remedies which we have just had occasion to notice.

In the laws of Alfred, the rates are higher, whether owing to a better appreciation of personal rights, or to the increase and consequent depreciation of the currency. In the laws of the Conqueror, the weres become very few.

Perhaps this is evidence of a civilization gradually increasing, and a jurisprudence slowly improving; for feeble, certainly, and unreliable, must be the tribunal charged with the task of imposing damages in civil suits, if the legislator considers it unsafe to be trusted with the assessment of the amount. This elaborate and minute specification, therefore, though on its face it appears to indicate the care and watchfulness of the lawgiver, on a closer examination furnishes stronger proof of his distrust of the judiciary. Arbitrary rules, which do not bend to the justice of the particular matter, especially when used to fix values, are always a misfortune and a defect in jurisprudence; they should never be tolerated, unless on account of some peculiar and extraordinary difficulty in arriving at the truth of the individual case.

What the judiciary was under the Anglo-Saxon government, it is now apparently impossible to learn. Sir Francis Palgrave says,\* "some kind of adjudication probably took place amongst

write the worth of the building, and the furniture, ootillage, and corn damage, together with the proof book.—

P. 145. An iron pan, a legal penny.

A flail, a farthing.—

P. 149. Wadded boots, four legal pence.

P. 151. Every other thing whatsoever, on which there is no legal worth, *is to be appraised*.—

§ XXIII. Now of the members of the human body.—

P. 157. Of corn damage this treats.—

§ 16. If a horse be found stretching his neck over a hedge, eating the corn, it is not right to take him, but to obtain compensation for damage, unless he be excused.—

#### *Anomalous Welsh Laws.*

P. 708, § 5. Three punishments for ferocious acts; the payment of galanas for the slain; death to him who does the deed, and harrying spoliation of the property of the murderer."

As I have said, I take these extracts from the *Ancient Laws of Wales*, published in one of the folios of the Record Commission; the valuable labors of that Commission, and their munificent liberality to the literary institutions of this country, cannot be too frequently nor honorably noticed.

\* Vol. I., p. 205.

the Anglo-Saxons before the were could be required." But any inquiry into this matter, even if practicable, would lead us far beyond our proper limits. It may not, however, be foreign to our subject to notice, that if the were or the wite could not be paid, it seems slavery was the consequence. "The criminal whose own means were insufficient, and whose relatives or lord would not assist him to make up the legal fine he had incurred, was either compelled to surrender himself to the plaintiff or to some third party, who paid the sum for him by agreement with the injured party. Such a serf was called criminal slave. These are the *servi redemptione* of Henry the First."\*

We now come to the examination of the tribunals, which, under our present system, are charged with the duty of assessing the amount of damages.

Various modes of trial in civil suits have obtained at different periods of English jurisprudence; trials by battle, wager of law, ordeal and by jury.

The trial by battle was the natural growth of the period at which we find it existing. "Man," says the learned and sagacious writer, whom I have already several times quoted, "never begins by introducing any law which is entirely unreasonable; but he very frequently allows a law to degenerate into folly, by obstinately retaining it after it has outlived its use and application."† We should naturally expect, in a barbarous and disturbed state of society, where every man's house was a castle, and the whole structure of society upon a martial basis, that questions of right would originally be decided by an appeal to force, and that the first efforts of the legislator and the jurist would only be to systematize and solemnize this mode of determining a controversy by subjecting it to fixed rules, and decreeing the result to determine the right forever.‡ This mode of trial naturally gave way before the advancing spirit of order.§

\* The Saxons in England, by J. M. Kemble, 1849, Vol. I., p. 197. In the continuation of this work, which the preface informs us is to discuss, among other things, the law of descent, contracts, and the forms of judicial process, a very valuable addition may be expected to our knowledge of the Anglo-Saxons.

† Palgrave's Rise and Progress, Vol. I., p. 229.

‡ "Ainsi," says M. Guizot, "s'est introduit dans la législation le combat judiciaire, comme une regularization du droit de Guerre, une arene limitée ouverte à la vengeance. Guizot, Hist. de la Civilization en France, Tome 1, p. 294.

§ Although singular as it appears, the appeal of death was not abolished in Eng-

The trial by ordeal, finally prohibited in the early part of the thirteenth century, was the creature of a superstitious age. It was the offspring of the clergy, and perhaps one among their many efforts to counteract the violence of the military portion of the community. In this aspect, it may not have been without its uses.

The wager of law, or trial by compurgators, of which we see constant traces in the Anglo-Saxon laws, and which existed till a very recent period,\* may claim a more reasonable origin. A party accused of an offense, exonerated himself from the charge, by the oaths of a certain number of witnesses, and as Sir Francis Palgrave well observes: "In criminal cases, the whole theory of this trial resolves itself into the ordinary practice of our modern courts of justice. Evidence has been given by which a presumption is raised against the accused, but not being conclusive, it is rebutted by the proofs of general good character."†

Of the four modes of trial of which we have spoken, then, the one that has survived them all, after undergoing, however, very material modifications in its construction, is the *trial by jury*. But it is not within the scope of our present subject, to trace the gradual formation of this institution. Suffice it to say, that trial by jury, originally a trial by witnesses, the jury being themselves the witnesses,‡ gradually supplanted the various

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land till within the last thirty years. See *Ashford vs. Thornton*, 1 B. & Ald., p. 405, which resulted in an act of Parliament.

\* 3 Black. Com., Ch. 22, p. 345. In New York, by II. Revised Statutes, p. 410, Part III. Ch. VII. Tit. IV. Art. 2, § 4, "trials by battle, and by the grand assize and all other modes of trial, except by a jury or by referees, are forever abolished." Wager of law existed in England till very recently. It was abolished in all cases by 3 and 4 W. 4, c. 42, § 18. Chitty on Pleadings, Vol. I., p. 142.

† Vol. I., p. 288. This analogy applies, however, only to those cases where the evidence is presumptive, and not positive, as in the latter class testimony to character is admitted only in mitigation of the sentence. "La véritable origine des *Compurgateurs*," says Guizot, "c'est que tout autre moyen de constater les faits était à peu près impraticable. Pensez à ce qu'exige une telle recherche, à ce qu'il faut de développement intellectuel, et de puissance publique pour le rapprochement et la confrontation des divers genres de preuves, pour recueillir, et débattre des témoignages, pour amener seulement les témoins devant les juges et en obtenir la vérité en présence des accusateurs et des accusés. Rien de tout cela n'était possible dans la société que régissait la Loi Salique; et ce n'est point par choix ni par aucune combinaison morale, c'est parcequ'on ne savait et ne pouvait mieux faire qu'on avait recours alors au jugement de Dieu et au serment des parons."—*Guizot, Hist. de la Civilisation en France, Vol. I., p. 285.*

‡ "The ancient jurymen were not empanelled to examine into the credibility of

modes of trial by battle, ordeal and wager of law, and from the time of the reign of Henry II. seems to have begun to acquire stability, if not its present form.\*

At all events, at the period of the earliest systematic records of judicial proceedings in England, the jury had become the tribunal which disposed of the question of fact, and the amount of damages became a principal part of their jurisdiction.

All hope of discovering how early this period was, is now, perhaps, lost, with the date of still greater interest, that of the origin of parliamentary representation.† But it is certain that damages by their present name, were known at a very early period of the English law. The statute of Gloucester, passed 6 Edward I., A. D. 1278,‡ after giving damages in certain real actions in which they were not previously recoverable, goes on to give costs in the same cases, and closes by enacting that the act shall apply to all cases where the party is to recover damages. "Et tout ceo soit tenu en tout cas ou homme recover damages."§

In Robert Pildford's case it is said,|| "It is to be known that this word *Damna* is taken in the law in two several significa-

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the evidence; the question was not discussed and argued before them; they, the jurymen, were the witnesses themselves, and the verdict was substantially the examination of these witnesses, who of their own knowledge, and without the aid of other testimony, afforded their evidence respecting the facts in question to the best of their belief. In its primitive form, therefore, a trial by jury was only a trial by witnesses."—*Palgrave*, Vol. I., p. 244.

\* The ordeal was prohibited by the 18th Canon of the Fourth Lateran Council, A. D. 1215.—*Palgrave*, Vol. I., p. 66. See, also, Repp on Ancient Trial by Jury, already cited, (p. 15, in notes,) an ingenious treatise to illustrate the gradual formation of the jury, from the wager of law and the trial by battle. To Sir Francis Palgrave's work I acknowledge great obligations. Indeed, to the legal student who desires an acquaintance with the origin of our jurisprudence, it is indispensable. Mr. Petheram says, in his Sketch of Anglo-Saxon Literature, that at its appearance it was not pecuniarily successful; but he well adds, "that for many years to come, it must form the basis of our knowledge respecting the frame work of the Anglo-Saxon government."—*Petheram's Sketch*, p. 146. Those, also, who desire a philosophical view of the Barbaric Codes, cannot be better referred than to Mr. Guizot's *Histoire de la Civilization en France*, the 9th and 10th lessons of the first volume, and Mr. Hallam's *History of Europe during the Middle Ages*, Vol. I., Chap. II., on the Feudal System.

† Turner's Anglo-Saxons, Book VIII., Ch. IV., Vol. III., p. 185, and Appendix III., Ch. IX., Vol. II., p. 536.

‡ Stat. at Large, by Ruffhead, Vol. I.

§ See Barrington's Observations on the Statutes, p. 109. "After verdict given of the principal cause, the jury are asked touching costs and damages."—*Jacob's Law Dict. in voc.*

|| Rep., Part X., p. 115.

tions, the one properly and generally, the other *relative* and *strict*. *Damna pro injuria illata*, and *expensæ litis*—in other words, damages and costs—"for *damnum*, in its proper and general signification, *dicitur a demendo, cum diminutione res deterior fit.*"\* It is of the *Damna pro injuria illata*, or of damages as now known by that phrase in opposition to costs, that we are here treating.

The jury in its present form dates, as has been already said, from the period of the reign of Henry II. (1150.)† Previous to that time, the great mass of business was transacted in the county courts, where the freeholders were judges of both law and fact. The *Aula* or *Curia Regis*, of which the King's Bench is a remnant,‡ disposed of the causes of the great Lords only. The exchequer already existed, but was a part of the *Aula Regis*.§

It would seem that this freeholder's court became very obnoxious, as ignorant of law, rendering it multiform, unequal and unjust; and these abuses were remedied by the appointment of justices in eyre, who settled the questions of law, leaving to the jury the questions of fact.¶ The origin of this curious division of power it is now impossible to trace with accuracy. A similar or analogous distinction existed in the Republican age of the Roman law under the procedure by *formula*; but that feature of their jurisprudence disappeared when the formula, together with the office of the *Judex* or Referee, was abolished, and the magistrates, under the despotic innovations of the Empire, disposed of the entire litigation *extra ordinem*. To this we shall have occasion hereafter to advert; suffice it for

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\* The origin of the word *Damnum* is thus given by Grotius: "*Damnum forte a demendo dictum. Ita Varro, libro v. Damnum a demptione, cum minus re factum quam quanti constat. Alii magis probant derivare a Græco δαμνω, ut sit dapnum, deinde damnum; ut vixes, sopnus, somnus. Nec absurdo deducas a Græco δαμνω, quod est βία, aut ex ἡγρία, damia, damnum; ut regia, regnum.* De Jure Bell. et Pac. Lib. II., Cap. 17. The Digest says: *Damnum et damnatio ab ademitione et quasi deminutione patrimonii dicta sunt.* De Damno Infecto, L. 89, Tit. 2, § 3.

† "Although Henry II. was not in strictness the inventor of that legal constitution which succeeded to the Anglo-Saxon policy, yet '*Trial by the Country*' owes its stability, if not its origin, to his jurisprudence."—*Palgrave, Chap. VIII., Vol. I., p. 248.*

‡ Bl. Com., B. 3, Ch. 4, § 6, p. 41.

§ Hale's History C. Law, c. 7. Sullivan's Lec., 32, p. 800. Bl. Com., B. 3, ch. 4, § 6.

¶ Sullivan's Lectures, Lect. 32, p. 296. Hale's Hist. of Com. Law, Ch. VII., Vol. I., p. 246.



the present to say that since the period to which we have referred, the maxim has generally held good in the English law, "*ad questiones legis respondent iudices; ad questiones facti juratores.*"

The quantum of damages being in most cases intimately blended with the questions of fact, must have been from the outset generally left with the jury. But we are not to suppose that the limits of their power over the amount of remuneration were at first as clearly defined as they have since become. In one case, as late as the reign of James I.,\* it is said that "*the jury are chancellors,*" and that they can give such damages as "the case requires in equity," as if they had the absolute control of the subject. So an early text writer puts the case of sheep passing the Severn, and one of them be forced into the water, and all the rest follow and be injured; and asks whether he shall have damages for all or for one; but the only solution he can find for the difficulty is, that the "jury must well consider of it."† While on the other hand the old books are full of cases, where, on judgment by default and even on demurrer, the courts themselves fix the amount of damages,‡ and the remains of this we see in the power still exercised by the English courts in cases of *mayhem*.

Indeed, for a long time after the distinction between law and fact was clearly established, and the separate province of judge and jury defined with considerable accuracy, there appears to have been an almost total want of any clear and definite understanding of those rules of damages which we are about to consider.§

Before commencing the more practical part of this treatise, however, it will be well to bear distinctly in mind the general principle which the English law has in view in this matter, and how in this respect it differs from other systems of jurisprudence.

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\* Sir Baptist Hixt's case, Rolles Abr. II., p. 708; Trial. pl. 2.

† Shepherd's Epitome, p. 70.

‡ Rolles Abr., Tit. Damages. The Queen's Bench has still the power to assess damages, on demurrer, or default, without the intervention of a jury.—*Whitaker vs. Harold*, 10 Jur., 1004, 12 Jur., 896.

§ For a very full and able description of the powers and duties of court and jury under our system, see *Commonwealth vs. Porter*, 10 Met., 268, and many cases there cited.

We have seen in the early laws of the Anglo-Saxons, that with the most minute care, specific damages were arbitrarily assessed in each class of cases, without reference to the actual injury sustained in the particular case. We find in codes still more ancient, rules equally arbitrary in this respect. In the Jewish law, (Exodus, chap. xxi., v. 32,) various provisions of a similar nature are incorporated; thus, "If a man's ox push (gore) a man servant or maid servant, he shall give unto their master *thirty shekels of silver*, and the ox shall be stoned." So, again, chap. xxii., v. 9: "For all manner of trespass, whether it be for ox, for ass, for sheep, for raiment, or for any manner of lost thing which another challengeth to be his, the cause of both parties shall come before the judges, and whom the judges shall condemn, he shall *pay double* unto his neighbor." So, again, by a rough equity, xxi., v. 35: "If one man's ox hurt another's that he die, then they shall sell the live ox, and divide the money of it, and the dead ox also shall they divide."

The same principle is to be found in the laws of the Hindoos: "Where a claim is proved, the person who gains the suit is put in possession, and the judge exacts a fine of equal value from the defendant. And if the plaintiff loses his cause, he in the like manner pays double the sum sued for." And in regard to torts, the same principle was applied.\*

When we come to the Roman Law, we find the subject elaborately, but not very clearly nor very harmoniously treated. To understand its provisions, it is necessary to bear in mind the fact to which we have already adverted, that until the despotic centralization of the Empire had completely subverted the early institutions of the Republic, the same line was drawn in their administration of justice, as with us, between questions of law and questions of fact. The magistrate who heard the statements of the parties did not decide the cause. He turned the litigants over to a *Judex*, or Referee, or single Juror, as he may be regarded, giving him at the same time a *formula* or charge by which his decision was to be controlled. This control was, however, not an absolute one, and in some aspects of the cause, and particularly the extent of the liability of the defendant, and the *Litis æstimatio*, or Measure of Damages, the *Judex* seems

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\* Ayeen Akberry, by Gladwin, Vol. II., p. 498, 504.

to have been clothed with a large discretion. This discretion was, however, restrained and limited to a certain extent, by several special statutes.\*

The general definition of damages, the *id quod interest* or *utilitas* of the civil law, in the Code of Justinian, is the actual loss sustained and the profit which might have been made—in *quantum mea interfuit, id est quantum mihi abest, quantumque lucrari potui*.† A more distinct subdivision of the subject is into *damnum emergens*, or loss arising, and *lucrum cessans*, or profit prevented.‡ But how far in each case the party is liable, when for *damnum emergens* only, when for *lucrum cessans*, and to what extent, the texts of the Roman Law leave us greatly in doubt. They inquire in each case whether the party is to be considered guilty of *dolus*, fraud or evil design, or of *culpa* only; if of *culpa*, whether *culpa lata*, or *culpa levis* merely, and the nice shades of distinction which they attempt to define, have at once excited and baffled the ingenuity of modern commentators. In all these questions the Judex appears to have exercised a very considerable discretion.§

In the award of compensation, or damages as we term it, the *litis aestimatio*, the Judex seems also to have been little bound by any settled rules. In cases of fraud or gross negligence, which is as near as we can render *dolus* and *culpa lata*, the plaintiff or *actor* was permitted himself to swear to the amount of injury sustained; and there seems originally to have

\* See, as to the three stages of the Roman procedure, the *Legis actiones*, the *Formula* introduced about 650 A. U. C., and the forms of the Empire, *Das Römische Privatrecht* von Wilhelm Reim, Book 5.

† *Rat. Rem. Hab. Dig.*, Lib. 46, Tit. VIII., § 18.

‡ *Dig. de Damno Inf.*, Lib. 26, (89. 2.)

§ "Ueber die Frage wie weit in einem jeden Falle das Interesse praestirt werde, ist in dem Römischen Rechte wenig vorhanden, woraus sich bestimmte Grundsätze ableiten liessen. Doch geht die gewöhnliche Meinung dahin, dass in Fällen wo *Dolus* oder *Culpa lata*, oder *contumacia insignis* die Ursache des Schadens sey, sowohl *damnum* als *lucrum*; hingegen wo nur eine gewöhnliche culpa zum Grunde liege, bloss das *damnum emergens* vergütet werde."—*Haenel, vom Schadenersatze, Leipzig*, 1828. § 81. The books of the German scholars are numerous; one of the most recent is *Die Culpa des Römischen Rechts*, von J. C. Hasse, edited by Bethmann Holweg, Bonn: 1888. But the writers of this class, though profound scholars and acute reasoners, appear to me to lose themselves in a maze of contradictory and obscure citations from the vast storehouse of the Pandects, and in a perhaps still more hopeless metaphysical labyrinth of abstract discussions on the different shades of fraud and fault. Nothing do they less resemble than the clear and practical manner of our writers. The best manual of the subject that I have seen is the work from which the above citation is made.

been no check on this prerogative, *in infinitum jurari potuit*; but this license was restrained by positive provisions, which gave the power of assessment to the Judex.\* To check still more effectually the abuses which would necessarily flow from such a state of things, various statutory provisions were introduced, and an effort was made to obviate the difficulty by fixed valuations not to be departed from.†

An arbitrary rule of a very singular character was established by the Lex Aquilia,‡ which provided by its first chapter, that in case of the killing of any slave or cattle, unless by mere chance, the trespasser should pay the master as much as the property had been worth at any time within the year. *Damni injuriæ actio constituitur per legem Aquiliam, cujus primo capite cautum est ut si quis alienum hominem alienamve quadrupedem quæ pecudum numero sit, injuria occiderit quanti ea res in eo anno plurimi fuerit tantum domino dare damnetur.*§ So that if a slave was killed who at the time of his death was a cripple, but within the year had been sound and valuable, his full value as sound was to be paid.

By the second chapter of this law, other kinds of intentional or negligent injury to property were punished; but in these cases, the estimate of damages was limited to the highest value of the thing injured within thirty days previous. *Non quanti in eo anno, sed quanti in diebus triginta proximis res fuerit, obligatur is qui damnum dederit.*|| The remedy given by the Lex Aquilia may be considered as very analogous to our actions of trespass and case;¶ but it was limited to wrongs actively perpetrated, and mere acts of non-feasance did not come within its scope.\*\* In consequence, other enactments were made and

\* D. de in Lit. Jur., L. 4, § 2, (12. 8); L. 5, § 1 eod. Haenel, § 95, p. 110.

† Rat. Rem. Hab. Dig. Lib. 46, Tit. VIII., § 18.

‡ Inst., Lib. IV., Tit. III. De lege Aquilia, Dig. Lib. IX., Tit. II., Ad Legem Aquiliam. This law is said to have been passed as early as 467 A. U. C.

§ See, on this subject, in the works of Molinæus (Dumoulin, Ed. 1681, Vol. III., p. 423,) his *Tractatus de eo quod interest*. It is frequently referred to by Pothier, as one of the most valuable expositions of the civil law on the measure of damages.

|| Inst. IV., Tit. III., § 14.

¶ Inst. IV., Tit. III., § 9. Brown's Civil and Admiralty Law, B. III., Ch. I., Vol. II., p. 401. Cooper's Justinian, in notes. Hugo., § 288. The provisions of the law are very curious, and worthy of a more careful examination than the scope of this work permits.

\*\* "Zuvörderst waren alle Beschädigungen ausgeschlossen die in einem blossen Nichtthun bestehen."—*Hasse Culpa des Römischen Rechts*, § 6, p. 21.

the same principle of arbitrary and fixed valuation was applied to matters of contract for sums certain,\* in which cases it was provided that damages should not be given beyond the double of the amount in question; *hoc quod interest dupli quantitatē minime excedere*.†

The civil law, as introduced into modern Europe, seems to have retained the early features of its original, in the respect of which we are now speaking, and instead of laying down any fixed or arbitrary rule, to have left the matter very much to the discretionary consideration of the tribunal which has cognizance of the cause.

So, under the civil law, as established in France, and previous to the adoption of the Code Napoleon, damages were divided into interest and damages, *intérêts* and *dommages-intérêts*. *Intérêt* answers precisely to our interest, and is the measure of damages inflicted for the breach of a mere pecuniary obligation, as in the common cases of bills and notes. *Dommages-intérêts* correspond with our term damages in its application to all other forms of action; and in this respect it is that the system appears loose and uncertain.‡

After laying down the rule in regard to interest, which as with us is limited to a fixed rate, Domat says:§ “The other kinds of damages are undefined, and are increased or diminished, according to the discretion of the judge, dependant upon the facts and circumstances of the particular case; thus, in the case of a tenant who omits to make the repairs to which he is bound by his lease, or of a contractor who does not perform his

\* Code, Lib. VII., Tit. 46. De Sent. quæ pro eo quod int. prof.

† The original of this rule is, probably, to be found in the Twelve Tables. “*Si quid endo deposito dolo malo factum esset duplione luito. Si depositarius in re deposita dolo quid fecerit in duplum condemnatur.*” See Pothier's Pandects, by Bréard Neuville. Vol. I., p. 382—384—386.

‡ In addition to the two heads of Interest and Damage, Domat makes a third of *Restitution des Fruits*, which we shall consider under the head of Mesne Profits, it being fairly a branch of the great subject of damages.

§ Loix Civiles, Liv. 8, Tit. V., Vol. I., p. 259. “Les autres sortes de dommages sont *indéfinis* et ils s'étendent ou se bornent différemment par la prudence du juge, à plus ou à moins selon la qualité du fait et des circonstances. Ainsi un locataire qui manque aux réparations qu'il doit par son bail, un entrepreneur qui manque de faire l'ouvrage qu'il a entrepris ou qui le fait mal doivent *indéfiniment* les dommages et les intérêts qui peuvent suivre du défaut d'avoir exécuté leur engagement; et on les règle différemment, selon la diversité des pertes qui arrivent, la qualité des faits qui les causent et les autres circonstances.”

contract, or performs it ill; in either case they owe an indefinite amount of damages resulting from the default, and these damages are differently regulated according to the loss which has happened, the nature of the facts and the attendant circumstances."

And he illustrates these rules by one or two cases as to profits claimed as loss where he says, "It must be left to the discretion of the judge to arrive at some measure of compensation according to the circumstances and the particular usages, if there are any."\* And again,† "It results from all the preceding rules, that as questions of damages depend on the attendant facts and circumstances, they must be decided by a sound discretion, exercised as well with regard to the circumstances of the case as to general principles."

And so says Pothier,‡ "It is necessary to exercise a certain degree of moderation in estimating the amount of damages, according to the particular case." And again,§ "Damages are to be moderated where they would otherwise be excessive, by leaving the computation to the arbitrament of the judge." So, again,|| "Where the damages are considerable in amount, they

\* P. 262, "Il doit dépendre de la prudence du juge d'arbitrer et de modérer quelque dédommagement selon les circonstances et les usages particuliers s'il y en avoit."

† Book III., Tit. V., Sec. 2, Vol. I., p. 270. "Il résulte de toutes les règles précédentes que comme les questions des dommages et intérêts naissent toujours des faits que les circonstances diversifient, c'est par la prudence du juge qu'elles se décident, en joignant aux lumières que les principes doivent donner, le discernement des circonstances et des égards qu'on doit y avoir." I find in an old French work, 1687, *Recueil des Arrêts Notables*, a curious illustration of the looseness of the old French law, in this respect. It says: "En estimation des Dommages et Intérêts quand les experts sont discordans, le juge d'office doit prendre un tiers, et s'ils ne s'accordent le *juge ne doit suivre ni la haute ny la moindre estimation*." So, again, in the *Journal des Audiences*, T. 6, p. 252, on the question whether a promise given by a female to marry under a *débit*, or forfeit of a fixed sum was to be regarded as liquidated damages. "La proposition *stipulatio panas in contractu sponsalium appositâ improbat* est écrite dans tous nos livres, qui ont traité de la matière—Dans la jurisprudence on ne s'arrête point à ces stipulations de peine—Les Dommages-intérêts ne sont adjugés que *ad arbitrium boni viri*—suivant que le méritent les cas de mauvaise foi, de la condition des personnes, de la dépense, perte, ou deshonneur."

‡ *Traité des Obl.*, Part I., Chap. II., Art. 2, § 180. "Il faut même selon les différens cas, apporter une certaine modération à la taxation et estimation des dommages dont le débiteur est tenu."

§ § 164, "Nous devons modérer les dommages et intérêts lorsqu'ils se trouvent excessifs en laissant cette modération à l'arbitrage du juge."

|| "Quand les dommages et intérêts sont considérables, ils ne doivent pas être taxés et liquidés en rigueur, mais avec une certaine modération."

should not be rigorously assessed, but with a certain degree of moderation." And again, even in cases of fraud:\* "It must be left to the discretion of the judge, even in cases of fraud, to exercise a certain degree of indulgence in fixing the amount of damages."

Merlin uses substantially the same language; he says,† "It is to be observed that the law of Justinian, so far as it limits exorbitant or excessive damages to precisely double the value of the thing in controversy, has not the force of law with us, [and the Code has not incorporated it among its provisions,] but the principle on which it is founded, being one of natural equity, it should be adhered to, by moderating the damages wherever they are too great, by leaving them to the arbitrament of the judge."

In the various systems of jurisprudence which we have thus cursorily examined, we see that the difficulty inherent in the subject, is sought to be avoided, either by fixing on an arbitrary valuation of the loss sustained applicable to all cases, or by leaving the whole matter largely to the discretion of the tribunal which has cognizance of the subject.

Our law differs very materially from all these systems. By it, in all cases of civil injury, or breach of contract,‡ with the exception of those cases of trespasses or torts, accompanied by oppression, fraud, malice, or negligence so gross as to raise a presumption of malice, where the jury have a discretion to award exemplary or vindictive damages; in all other cases the declared object is to give *compensation* to the party injured, for the actual loss sustained.§ And the amount of this compensation is a question of law, not governed by any arbitrary assessment, nor, on the other hand, left to the fluctuating discretion of

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\* § 168, "Il doit être laissé à la prudence du juge, même en cas de dol d'user de quelque indulgence sur la taxation des dommages et intérêts."

† *Repertoire; Dommages et Intérêts*, vol. 8, "Il faut observer que la loi de Justinien en ce qu'elle réduit précisément au double de la valeur de la chose les dommages et intérêts exorbitants, n'a pas force de loi parmi nous, [et le Code Civil ne l'a pas remis en vigueur,] mais le principe sur lequel elle est fondé, étant un principe qui émane de l'équité naturelle on doit s'y conformer, et en conséquence, modérer les dommages et intérêts lorsqu'ils se trouvent excessifs en laissant cette modération à l'arbitrage du juge."

‡ There is a single exception in regard to contracts—that of promise of marriage, which, as we shall see, is left largely to the discretion of the jury.

§ *Smith vs. Sherwood*, 2 Texas R., 460.

either judge or jury. By the general system of our law, for every invasion of right there is a remedy, and that remedy is *compensation*. This compensation is furnished in the damages, which are awarded according to established rules; and these rules form what is called the Measure of damages.

"Wherever," says Blackstone, "the common law gives a right, or prohibits an injury, it also gives a remedy by action."\* "If a statute gives a right," said Lord Holt, "the common law will give a remedy to maintain that right; *a fortiori* where the common law gives a right, it gives a remedy to assert it. This is an injury, and every injury imports a damage."† "It is the pride of the common law," says the Supreme Court of New York, "that wherever it recognizes or creates a private right, it gives a remedy for the wilful violation of it."‡

"Another species of property," says Blackstone,§ "acquired and lost by suit and judgment at law, is that of damages, given to a man by a jury as a *compensation* and satisfaction for some injury sustained." "Every one," said Lord Holt,|| "shall recover damages in proportion to the prejudice which he hath sustained." "Damages—*damna* in the common law," says Lord Coke,¶ "hath a special signification for the *recompence*, that is given by the jury to the plaintife, for the wrong the defendant hath done unto him."

"It is a general and very sound rule of law," said Sedgwick, J., delivering the opinion of the Supreme Court of Massachusetts,\*\* "that where an injury has been sustained, for which the law gives a remedy, that remedy shall be commensurate to the injury sustained." "It is a natural and legal principle," said Shippen, Chief Justice of the Supreme Court of Pennsylvania,†† "that the compensation should be equivalent to the injury." "The general rule of law," said Story, J., to the jury on the

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\* Com., III., Ch. VIII., p. 128.

† Ashby *vs.* White, 1 Salk., p. 19.

‡ Yates *vs.* Joyce, 11 J. R., p. 136. See, also, Lamb *vs.* Stone, 11 Pick., p. 527. Allison *vs.* McCune, 15 Ohio, 726; and Webb *vs.* Portland Manuf. Co., 8 Sum. 192.

§ Com., II., Ch. 29, p. 438.

|| Ferrer *vs.* Beale, 1 Lord Raym., p. 692.

¶ Co. Litt., 257, a.

\*\* Rockwood *vs.* Allen, Ex'r., 7 Mass., p. 254.

†† Bussy *vs.* Donaldson, 4 Dallas, 206.



Rhode Island circuit,\* "is this: whoever does an injury to another, is liable in damages to the extent of that injury. It matters not whether the injury is to the property, or the person, or the rights or the reputation of another."

And this compensation is awarded, except in those cases to which we have referred, according to certain rules of law which the jury are not at liberty to disregard, and which equally control the conduct of the court. "In cases," said Washington, J., on the Pennsylvania circuit,† "where a rule can be discovered, the jury are bound to adopt it. That rule is, that the plaintiff should recover so much as will repair the injury sustained by the misconduct of the defendant." In regard to the rate of damages on a foreign bill of exchange, the New York Court of Errors said "In this, as in other cases of contract, the rule by which the amount or extent of redress should be ascertained, is a question of law."‡

It is not, however, to be understood that legal relief is to be had for every species of loss that individuals sustain by the acts of others. It is undoubtedly true that damage resulting from fraud, deceit or malice, always furnishes a good cause of action.§ "This principle," says the Supreme Court of Ohio, "is one of natural justice long recognized in the law."|| But where the injury is not to be traced to any evil motive, the rule is by no means universal that injury is always entitled to redress. In addition to the great class of moral rights and duties which the law does not attempt to protect or enforce,¶ there are many sufferings inflicted by human agency, where the immediate instruments of the injury are free from fault or the act beyond their control. In these cases the law does not seek to interfere.\*\*

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\* Dexter vs. Spear, 4 Mason, p. 115.

† Walker vs. Smith, 1 Wash. C. C. R., p. 152.

‡ Graves vs. Dash, 12 J. R., p. 17.

§ Paisley vs. Freeman, 8 T. R., 51. Upton vs. Vail, 6 J. R., 182. Barney vs. Dewey, 18 J. R., 224.

|| Bartholomew vs. Bentley, 15 Ohio, 659, 666.

¶ Paisley vs. Freeman, 8 T. R., p. 51.

\*\* Such are the cases governed by the maxim *Salus populi suprema lex*. "There are many cases," says Mr. Broom, in his recent interesting and valuable work on Legal Maxims, p. 1, "in which individuals sustain an injury for which the law gives no action, as where private houses are pulled down, or bulwarks raised on private property for the preservation and defense of the kingdom against the king's enemies." Such, again, are those which fall within the maxim "*Necessitas inducit privilegium*

It is only legal injury that sets its machinery in operation, and this is meant by the maxim that *damnum absque injuria* gives no cause of action.\* So, if in the prudent and reasonable exercise, by an owner of property, of his right of dominion, another sustains damage, it is *damnum absque injuria*.† So it has been said in regard to a corporation charged with committing a nuisance. "If the defendants have only pursued the path presented for them by the laws from which they derive their existence, they have committed no wrongful act. Though the plaintiff may have sustained damage, it is *damnum absque injuria*, for the act of the law, like the act of God, works no wrong to any one."‡

There must, too, not only be *loss*, but it must be injuriously brought about by a violation of the *legal rights* of others. "No one, legally speaking," says the Supreme Court of New York, "is injured or damnified unless some *right* is infringed. The refusal or discontinuance of a favor gives no cause of action."§ The prosecution of this inquiry, however, would lead us directly into the great field of causes of action. Suffice it for our pre-

*quoad jura privata.*" "As a general rule," says Mr. Broom, in his work above cited, p. 6, "the law charges no man with default where the act done is compulsory and not voluntary, and where there is not a careful selection on his part; and therefore, if either there be an impossibility for a man to do otherwise, or so great a perturbation of the judgment and reason, as in presumption of law man's nature cannot overcome, such necessity carries a privilege in itself." I beg leave very humbly to recommend Mr. Broom's work to those who desire to rivet in their minds, not only the rules but the reason of our jurisprudence.

\* *Ashby vs. White*, 1 Salk., p. 20; S. C. 2 Ld. Raym., p. 955. *Lamb vs. Stone*, 11 Pick., p. 527. *Broom's Legal Maxims*, p. 98. "In point of law," said Rolfe B. in *Davies vs. Jenkins*, 11 Mees. & Wels., p. 755, where process had been by mistake served on the wrong person, "if the proceedings have been adopted purely through mistake, though injury may have resulted to the plaintiff, it is *damnum absque injuria*, and no action will lie." "This is one of those unfortunate cases," says the same learned Judge, in *Winterbottom vs. Wright*, 10 Mees. & Wels. p. 109, a suit by a mail coachman against a contractor for supply of mail coaches, for injury resulting from a coach breaking down, "in which there certainly has been *damnum*, but it is *damnum absque injuria*." So in Massachusetts, where the owner of land made an excavation therein near the street, and a person in the night time fell in; held, that the owner was not liable. "Where neither party is in fault," said the Supreme Court, "and an accident takes place, it is *damnum absque injuria*."—*Howland vs. Vincent*, 10 Met., 871.

† *Gardner vs. Hearst*, 2 Barb. S. C. R., p. 168; and *Vide post*, Ch. 8.

‡ *First Baptist Church vs. Sch'y & Troy R. R. Co.*, 5 Barb. S. C. R., 79.

§ *Mahan vs. Brown*, 18 Wend., 261, where it was held that an action will not lie for obstructing a neighbor's lights, if they be not ancient lights, and no right has been acquired by grant or occupation and acquiescence.

sent purposes to say, that whenever loss is coupled with legal injury, the law gives compensation.

It is further to be borne in mind, that if loss without legal injury goes unredressed, the correlative proposition is equally true, that the infringement of a legal right, when unattended by any positive injury, furnishes no ground for other than nominal relief. It is not sufficient that an act unauthorized by law has been committed. For *Injuria sine damno* there is no compensation. Substantial loss to the party plaintiff must have ensued to entitle him to substantial relief. *De minimis non curat lex*.\* But of this we shall have occasion to take notice again when we come to consider the subject of nominal damages.

To this general principle, that where loss and legal injury unite, relief will be given by suit, the law recognizes one exception, that where the wrong is on so great a scale that the whole community, or a large portion of them suffer from it. "Here," says Blackstone, "I must premise that the law gives no *private* remedy for anything but a *private* wrong."† And so the law is laid down by Lord Coke, in regard to nuisances on the highway. "A man shall not have an action on the case for a nuisance done in the highway, for it is a common nuisance, and then it is not reasonable that a particular person should have the action, for by the same reason that one person might have an action for it, by the same reason every one might have an action, and then he would be punished a hundred times for one and the same cause." In such case the remedy is by indictment. But Coke goes on immediately to make this distinction: "But if any particular person afterwards, by the nuisance done, has more particular damage than any other, then for that particular injury he shall have an action on the case."‡

The rule and the exception have both been repeatedly recognized in England and in the courts of this country, though there has been much controversy as to the nature and amount of the "particular damage," that will support the action. It has been held in England, that an obstruction of a navigable creek, by which the plaintiff's vessel was arrested in her course,

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\* Paul vs. Slason, 22 Verm. R., 231.

† Com., III., Ch. 13, p. 219. IV., Ch. 13, p. 167. Broom's Legal Maxims, p. 4.

‡ Williams's case, 5 Rep., p. 72.

was sufficient to maintain a suit,\* and where a corporation bound to repair certain banks, mounds, sea shores and piers, neglected to do so, in consequence of which the plaintiff's house was injured, it was also held that the action lay.† So, again, where a bookseller, having a shop by the side of a public thoroughfare, suffered loss in his business in consequence of passengers having been diverted from the thoroughfare by the defendant's continuing an unauthorized obstruction across it for an unreasonable time, this was held a sufficient particular damage to be the foundation of an action.‡ The doctrine of these cases has been substantially adopted in this country, as we shall have occasion to see when we come to treat of trespasses to real estate.§

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\* *Rose vs. Miles*, 4 Maule & Sel., p. 101, which virtually overruled *Hubert vs. Groves*, 1 Esp. R., 148, and *Paine vs. Partrick*, Carth., 191; and the doctrine of *Rose vs. Miles*, was affirmed in *Greasley vs. Codling*, 2 Bing. R., p. 268, as to a highway. The authority of *Hubert vs. Groves* has also been denied in this country. *Lansing vs. Wiswall*, 5 Denio, 218.

† *The Mayor and Burgesses of Lyme Regis vs. Henley*, 1 Bing. N. C., p. 232.

‡ *Wilkes vs. Hungerford Market Company*, 2 Bing. N. C., p. 281, where the authority of *Hubert vs. Groves* was again denied.

§ *Pieroe vs. Dart*, 7 Cowen R., p. 609. *Lansing vs. Smith*, 8 Cowen, 152, S. C.; 4 Wend., 9. *Mills vs. Hall*, 9 Wend., 315. *The Mayor, &c. vs. Furze*, 8 Hill, 612, and *Myers vs. Malcolm*, 6 Hill, 292. *Hay vs. Cohoes Co.*, 8 Barb. S. C. R., 42. *Lansing vs. Wiswall*, 5 Denio, 218. *First Baptist Ch. vs. Sch'y & Troy R. R. Co.*, 5 Barb. S. C. R., 79. *Baxter vs. Winooski Turnpike Co.*, 22 Vermont, 114. *Stetson vs. Faxon*, 19 Pick., 147. In the *Proprietors of the Quincy Canal vs. Newcomb*, (7 Met. p. 276,) it was said, "that if a party had suffered damage from the filling up of a canal and want of cleansing, by means of which he was unable to enter it, it would have been a damage suffered in common with all other members of the community, and therefore redress must be sought by a public prosecution. Where one suffers in common with all the public, although from his proximity to the obstructed way, or otherwise, from his more frequent occasion to use it, he may suffer in a greater degree than others, still he cannot have an action, because it would cause such multiplicity of suits as to be itself an intolerable evil. But when he sustains a special damage differing in kind from that which is common to others, as where he falls into a ditch unlawfully made in a highway, and hurts his horse or sustains a personal damage, then he may bring his action."

In Pennsylvania, the rule has been applied to an obstruction in the Big Schuylkill, which prevented the plaintiff's rafts from descending. *Hughes vs. Heiser*, 1 Binney, p. 468. In that State, when a private person suffers some extraordinary damage beyond other citizens, by a public nuisance, he shall have a private satisfaction by action, even if his special damage be merely consequential. *Pittsburgh vs. Scott*, 1 Barr, Penn. State Rep., p. 309. In Kentucky, it has been said that it is not enough that one be turned out of the way. *Barr vs. Stevens*, 1 Bibb's Kentucky Reports, p. 298. In Connecticut, see *Bigelow vs. Hartford Bridge Co.*, 14 Conn., 565; and *O'Brien vs. Norwich & W. R. R. Co.*, 17 Conn., 872; and see post., Ch. V. The doctrine is the same in regard to abatement: "The ordinary remedy for a public nuisance is itself public, that of indictment, and each individual who is only injured as one of the public, can

We shall be obliged to make a more minute examination of this subject when we come to speak particularly of the subject of Nuisances;\* but we should not omit to notice here that in cases like these, in which the right to relief depends upon the amount of injury, we may be said to approach a vanishing point, where all distinctions between the cause of action and the rule of compensation are confounded and lost.

It is proper here to call attention to the distinction maintained between those cases of a criminal character, which can be compromised by the parties themselves, and those in which no such private interference is permitted. It was early held that a contract to withdraw a prosecution for perjury is founded on an unlawful consideration and void. If the party charged were innocent, the law was abused for the purpose of extortion; if guilty, it was eluded by a corrupt compromise, screening the criminal for a bribe.† The subject has been much considered in subsequent cases, and it seems now to be well settled that the right to compromise depends on the right to recover damages in a civil action. "The law permits a compromise of all offences, though made the subject of a criminal prosecution, for which offences the injured party might sue and recover damages in an action. It is often the only manner in which he can obtain redress. But if the offence is of a public nature only, no agreement can be valid that is founded on the consideration of stifling a prosecution for it." Therefore, although the party injured may lawfully compromise an indictment for a common assault, yet an agreement to pay the costs of a prosecution for an assault on the plaintiff, and riot, and of an action for a wrongful levy under a *fi. fa.*, which agreement was founded partly on compromise of the prosecution, and partly on an undertaking to withdraw the execution, is altogether invalid as founded on an illegal consideration.‡

There is, as has already been said, a large class of cases where the common law, in giving relief, loses sight of the principle of compensation, and gives damages by way of punish-

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no more proceed to abate than he can bring an action."—*Mayor of Colchester vs. Brooke*, 7 Q. B. R., 339, 377.

\* Post, Ch. V.

† *Collins vs. Blantern*, 2 Wils., 341, 349.

‡ *Keir vs. Leeman*, 6 Q. B. R., 306.

ment for acts of malice, vexation, fraud, or oppression. In these cases it has been found difficult to set any fixed or precise limits to the discretion of the jury, or, in fact, to prescribe any rule whatever. In other words they are left to what Domat, speaking of the court, calls, as we have seen, "*la prudence du juge*," reserving only to the bench the right of control over verdicts which bear the evident impress of prejudice, passion, or corruption. But before considering this branch of the subject minutely, it is necessary to have a more accurate idea of the legal meaning of the term compensation.

It has been said that the effect of our law is to give in damages what it calls compensation. When, however, we come to analyze this phrase, we shall find its juridical interpretation a very restricted one. Injury resulting from the acts or omissions of others, free from any taint of fraud, malice, or wilful wrong, consists :

*First.* Of the *actual pecuniary loss directly sustained* ; as the amount of the note unpaid ; the value of the property paid for, but not delivered.

*Second.* Of the *indirect pecuniary loss* sustained in consequence of the primary loss ; the profits that might have been made if the contract had been performed, the derangement and disturbance produced by the failure of others to comply with their engagements, and the consequent inability of those who depend on them to adhere to their own ; loss of credit ; loss of business ; insolvency.

*Third.* Of the *mental suffering* produced by the act or omission in question ; vexation ; anxiety.

*Fourth.* The *value of the time* consumed in establishing the contested right by process of law, if suit become necessary.

*Fifth.* The *actual expenses* incurred to obtain the same end —costs and counsel fees.

To these one further element is to be added in those cases where the aggressor is animated by a fraudulent, a malicious, or an oppressive intention, and that is:

*Sixth.* The *sense of wrong, or insult*, in the sufferer's breast, resulting from an act dictated by a spirit of wilful injustice, or by a deliberate intention to vex, degrade, or insult. This constitutes the difference, and the only difference between the injury produced by inability, and that produced by design. All

the other constituents are the same. The pecuniary loss, direct and indirect, the anxiety, the time and expense are the same, whether a wrong be done through the honest inability, the wilful fraud, or the deliberate malice of the offending party. But in the two latter cases, the last element is superadded; a sense of wrong or insult which does not exist in the former.\*

All these items must, therefore, be taken into the account in any effort to make complete *compensation*, in the ordinary acceptation of the word. But we shall find that the legal meaning of the term is very different. We shall find that in cases of contract, as a general rule, the law takes no notice whatever of the motives of the defaulting party; that whether the engagement be broken through inability or design, the amount of remuneration is the same;† and that in these cases, as well as in those of torts or breach of duty of any kind, where there is no complaint of fraud, malice, nor wilful negligence, of all the heads of loss above enumerated, only the first and fifth are taken into consideration, and the latter but imperfectly.

In all cases growing out of the non-performance of contracts, and in those of infringement of rights, or non-performance of duties, created or imposed by the law, in which there is no element of fraud, wilful negligence, or malice, the *compensation* recovered in damages, consists solely of the *direct pecuniary loss* which includes, in mere money demands, interest for the detention of the amount claimed, and the *costs* of the suit brought for the recovery of the demand. No *indirect loss* is accounted for. No allowance is made for the *mental suffering* of the party who complains of the non-performance of his contract, or the infringement of his rights—which, indeed, it may

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\* The Scotch law is the only one, so far as I am aware, which has endeavored practically to analyze the elements of injury. By the jurisprudence of Scotland, in actions for personal torts, the damages are divided into *special damages*, the actual pecuniary loss, and *solatium*, solace or recompense for the wounded feelings. So in *Forge vs. Henderson*, 1 Murray, p. 410, in assault and battery, the Lord Chief Commissioner Adam said, "There are first *special damages*, consisting of the surgeon's account, and the person being kept from his work. Second, the *solatium*, which is peculiarly within the province of the jury." So in *Cameron vs. Cameron*, 2 Murr., p. 282, "If no damages are proved, you cannot find them; but there is a claim for *solatium*, and you must consider what evidence there is of the injury to the mind and feelings."

† There is a single exception already noticed, the action for breach of promise of marriage, which we shall consider hereafter.

be said, the law possesses no scale to measure. This, however, is not the reason, for as little does it take into consideration the *time actually consumed*, and the *fees actually paid to counsel* for the establishment of the demand in controversy. In this class of cases, the *direct pecuniary loss*, and the *costs of the suit*, are all that the law means when it speaks of *compensation*. In fact, unless the word is used in a technical sense, it is altogether inaccurate to speak of damages as resulting in *compensation*; and whatever restricted meaning this term may be supposed to have technically acquired, it is at all events entirely incorrect to say in the language which we have above seen used by various eminent judges, that "*the remedy is commensurate to the injury*." This language attributes to legal relief a degree of perfection which it is very far from possessing.

"It would be going a great way," said Chief Justice Marshall,\* "to subject a debtor, who promises to pay a debt, to *all the loss* consequent on his failure to fulfill his promise. The general policy of the law does not admit of such strictness, and although in morals a man may justly charge himself as the cause of any loss occasioned by the breach of his engagement, yet, in the course of human affairs, such breaches are so often occasioned by events which were unforeseen, and could not easily be prevented, that interest is generally considered as compensation which must content the injured."

"It has been contended," said another eminent judge, "that the true Measure of Damages, in all actions of covenant, is the loss actually sustained. But this rule is laid down too generally. In an action of covenant for non-payment of money on a bond or mortgage, no more than the principal and legal interest of the debt can be recovered, although the plaintiff may have suffered to a much greater amount by the default of payment."†

In regard to the quantum of damages, instead of adhering to the term compensation, it would be far more accurate to say, in the language of Domat, which we have cited above,‡ "that the object is to discriminate between that portion of the loss which must be borne by the offending party, and that which

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\* Short *vs.* Shipwith, 1 Brock. R., 108 and 114.

† Tilghman, C. J., in *Bender vs. Fronberger*, 4 Dall. pp. 486, 444.

‡ *Supra*, p. 5.



must be borne by the sufferer." The law, in fact, aims not at the satisfaction, but at a division of the loss.

And it is to be borne in mind, that the same deficiency of compensation exists in the case of defendants as well as plaintiffs. If the party who receives the injury, is obliged to bear his proportion of the loss—so, on the other hand, the party wrongfully charged, only recovers his costs, and no allowance is made for his time, indirect loss, annoyance, or counsel fees. "Every defendant," says Mr. Broom, "against whom an action is brought, experiences some injury or inconvenience beyond what the costs will compensate him for."\*

The only considerable exception that can be said to exist to the general principle here stated, is that in regard to patents, where it has been held, in some cases in the United States, that the plaintiff may have such reasonable damages beyond his taxable costs as shall vindicate his right, and reimburse him for all the expenditures necessarily incurred in order to establish his right, provided the jury, in the exercise of a sound discretion, see fit to give them. We shall consider this exception more fully when we come to treat of the question of the allowance of counsel fees.† It grows to some extent out of the language of the Patent Act.

Thus far we have been speaking of the great class of cases where no question of fraud, malice, gross negligence, or oppression intervenes. Where either of these elements mingle in the controversy, the law, instead of adhering to the system, or even the language of compensation, adopts a wholly different rule. It permits the jury to give what it terms punitive, vindictive, or exemplary damages; in other words, blends together the interest of society and of the aggrieved individual, and gives damages not only to recompense the sufferer, but to punish the offender. This rule, as we shall see hereafter more at large,‡ seems settled in England, and in the general jurisprudence of this country.

There are other considerations as to the limits or boundaries of compensation, to which we shall be obliged hereafter to call

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\* Broom's Legal Maxims, p. 95. *Davies vs. Jenkins*, 11 Mees. & Wels., pp. 755, 756.

† *Pierson vs. Eagle Screw Co.*, 8 Story, p. 402. See Post., Chap. III.

‡ Ch. XVIII.

the reader's attention, under the head of *Recoupment*, which embraces an interesting class of cases growing out of equitable deductions to be made from demands in specified cases; to this subject, or one closely connected with it, I shall now only very generally advert.\*

Suppose the case of a plaintiff who has sustained positive injury, but whose loss has been made good by charitable contribution. Suppose a man beaten, and to incur a surgeon's bill, which is paid for him by some benevolent persons, can he still recover against the assailant? Cases of this kind have been put by eminent Judges, in a manner which implied they entertained no doubt that the charitable relief would be altogether thrown out of view in determining the legal rights of the parties.† And this seems the general rule in cases of tort. So in an action for collision, it was held in England that the defendant, by whose negligence the injury was sustained, could claim no deduction for the fact that the plaintiff had already recovered a large part of his claim from the underwriters‡ So in a case of false representation, the defendant is not allowed to defeat the action, by showing that the plaintiff had obtained for the property what he had paid for it.§ But, on the other hand, when we come to consider the subject of *Recoupment* we shall see that in cases of contract, as a general rule, the plaintiff can only recover to the extent of his actual injury, and that if that injury has been made good in any way, such compensation goes to reduce his claim.]

Upon the whole, in review of this branch of our subject, it must be considered inaccurate to say, that legal relief is commensurate with the injury sustained, or that the sole object is to furnish compensation. In ordinary cases of contract, the remuneration must be less; in cases of tort it may be more.

Having thus exhibited the general principles on which the law of this matter is based, we shall proceed to examine more minutely the amount of compensation awarded in particular

\* See Post, Chap. XVII.

† *Tindal, J., & Park, J., Yates vs. Whyte*, 4 Bing. N. C., 472.

‡ *Yates vs. Whyte*, 4 Bing. N. C., p. 472.

§ *Medbury vs. Watson*, 6 Met., 246. See to same point, *Stiles vs. White*, 11 Met., p. 354.

] Vide Post, Ch. XVII.

cases. In doing this, very considerable difficulty will be found to stand in the way of our efforts to make any arrangement of the subject, adapted to our system of jurisprudence, and at the same time logical and scientific.

In endeavoring to apply the rule of damages, to the different actions used among us, one broad line of distinction presents itself; that between real and personal property. This distinction, deriving its origin from the feudal system, is so firmly established, and our rules of proceeding, and even the right itself, so dependent on it, that in no general consideration of our law, can it be disregarded.

I have, therefore, first treated of actions for the recovery of real property; of suits to enforce remedies for the interruption or diminution of its enjoyment, and of those upon contracts relating to it. The first division embraces the action of ejectment, with its subsidiary, trespass for mesne profits and dower. The second, actions for trespass to lands; including proceedings in regard to nuisances and waste. The third, real covenants and contracts to convey land.

When we approach the subject of personal property, new difficulties, which grow out of the *forms of action*, present themselves in the way of any methodical arrangement of the subject. These forms have long been firmly established in the law of England; they exist in most of the States of the Union, and the rules of pleading, evidence, and of damages, have adapted themselves to their arbitrary and illogical arrangement.\*

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\* Great Judges have pronounced themselves strongly in favor of maintaining the forms of action; Lord Kenyon, in *Savignac vs. Rome*, 6 T. R., pp. 219, 120; Mr. J. Wilson, in *Israel vs. Douglas*, 1 H. Bl., p. 248; Eyre, C. J., in *Turner vs. Hawkins*, B. & Pull., p. 476; Abbott, C. J., in *Orton vs. Butler*, 5 B. & A., p. 654. See also, *Chitty's Pleadings*, Vol. I., p. 110, in note. "Settled forms of actions," said Tindal, C. J., in *Williams vs. Holland*, 10 Bing., 118, "adapted to different grievances, contribute much to the certain administration of justice."

More valuable testimony was borne to their importance by the English common law commissioners, the great reforms effected by whom, bear witness that they were not afraid to innovate. They say, Third Report, p. 6, "We cannot persuade ourselves, that with respect to the forms now in common use, (except that of ejectment,) any considerable change would be expedient. It is not that we are insensible to certain imperfections and inconveniences incident to these forms, for we feel that their classification is arbitrary and otherwise defective. But in this, as in so many other cases, we are presented with a choice of difficulties. To those who have observed the inconveniences which in other systems of judicature are found to flow from the want

It is, therefore, impossible to disregard them. At the same time I have endeavored to adopt an order somewhat different and more reasonable, than that which they suggest.

of fixed forms of action, it will be scarcely doubtful that they are an invention of real merit and importance. They tend most naturally to secure that certainty in the right of action itself, which is one of the chief objects of jurisprudence; they form a valuable check to vagueness and prolixity of statement, and in this and other respects, they are essential to the convenient application of the rules of pleading, a system, the peculiar advantages of which, we have elsewhere endeavored to illustrate."

With all that respect for the judgment of these commissioners, which their reputation as lawyers, and their still greater reputation as law-reformers, is calculated to excite, it is difficult to yield assent to this reasoning on the forms of action. Two similar contracts are made; one is sealed and the other not. It is evident that the right to relief, or in other words the *right of action* is in both cases precisely the same. How, then, does it tend to secure "certainty in that right," to declare that on the sealed instrument covenant must be brought, while assumpsit only will lie on the other? The *right of action* against an agent is the same, (provided fraud or malice do not intervene,) whether considered as a breach of contract or a violation of duty; and yet how many judgments in such suits have been arrested, because a count in assumpsit was inadvertently joined with one in case. See *Corbett vs. Parkinson*, 6 Barn. & Cres., p. 268; and *Lovett vs. Pell*, 22 Wend., p. 369. As to "vagueness and prolixity," the former will always be checked by the fundamental rules of evidence, that the proofs must follow the allegations; and as to the latter, it never would exist, if not fostered by the pernicious system of taxing costs by the folio. Our chancery jurisprudence well illustrates this. A bill in equity is *prolix* because it is paid for by the folio. It is *not* vague; on the contrary, the precise grievance complained of can almost always be ascertained with infinitely more certainty than from a common law declaration. For after all, the proposed ends are not attained. What more vague than a declaration in trover, or on the money counts? What more prolix than a declaration in covenant, with a dozen breaches and a count for every breach? As to the rules of pleading, the experience of the English system is itself proof, that the forms of action are in no wise wanted to secure the logic of that system. The arbitrary pleadings for the *defence* are there entirely abandoned—the general issue has given way to rational and intelligible statements of the real cause of defence. When the forms of *pleas* are abandoned, why should the forms of *declarations* be retained? If the general issue is not essential to the rules of pleading, why are the forms of debt or trover? In fact, the forms of action are, in my humble judgment, the greatest barrier to the proper application of the best part of the science of pleading, that which is directed to the singleness and certainty of the issue. In regard to the rules of damage, the results of the system are eminently illogical; thus, for instance, take the case of a tortious removal, conversion, and sale of personal property—the plaintiff has three distinct remedies, and in each the rule of damages is different. If he adopt assumpsit, on the count for money had and received, he can only recover the amount of the actual proceeds of the property. If trover, he will be allowed the highest value at any time before trial; and if trespass, he can have vindictive damages for the wrong.—*Greenleaf's Evidence*, Vol. II., p. 218. *Vide Post*, Ch. XIX., *Trover*.

It seems to me very plain, from the course of legal reform both in England and in this country, that we are rapidly tending towards the abolition of all arbitrary forms of action. Thus, in Massachusetts, by the provisions of a statute, 1886, c. 278, § 8, the court has power to amend the plaintiff's proceedings, by giving him leave to change his form of action.—*Wiley vs. Yale*, 1 Met., p. 558. What is this, however, but to leave the trap set for the unwary, to be opened or not, according to the discretion of the tribunal. And no one who ever has had his rights dependent on discretionary power,

One distinction presents itself too plainly to be overlooked ; that which separates those cases where the damages are wholly at large, and under the control of the tribunal, from those

will forget Lord Camden's glowing words: "Discretion is the law of tyrants; it is always unknown; it is different in different men; it is casual, and depends on constitution, temper, and passion. In the best it is oftentimes caprice; in the worst, every vice, folly and passion, to which human nature is liable."—*Argument in Hindson vs. Keresey.*

But the controversy is as old as the time of Cicero; no lawyer can be ignorant of the ridicule with which, in his oration for Murena, he overwhelms the verbiage and formulas of that day. *Hoc fieri bellissimum posset; Fundus Sabinus meus est; immo meus; deinde judicium: noluerunt.*—*Nam cum permulta præclare legibus essent constituta, ea jureconsultorum ingeniiis pleraque corrupta ac depravata sunt—hædem ineptiis fucata sunt omnia—totum est contemptum et abjectum.*—*Orat. pro Murena.*

Since the above was published in the first edition of this work, its prognostications have been justified in at least two of the States of the Union. In New York, in April, 1848, an act was passed entitled, "An Act to simplify and abridge the Practice, Pleadings, and Proceedings of the Courts of this State," the preamble of which is as follows: "Whereas, it is expedient that the present forms of actions and pleadings in cases at common law should be abolished, and that the distinction between legal and equitable remedies should no longer continue, and that a uniform course of proceeding in all cases should be established." And in accordance with this preamble, the act now known as the Code of Procedure goes on, in section 69, (§2 of the Code of 1851,) to enact that "the distinction between actions at law and suits in equity, and the forms of all such actions and suits heretofore existing are abolished, and there shall be in this State hereafter, but one form of action for the enforcement and protection of private rights, and the redress of private wrongs, which shall be denominated a civil action." But though the forms of action are abolished, the distinction between legal and equitable remedies still remains. *Linden vs. Fritz*, 8 Code Rep., 164, 5 Prac. R., 188, 191. 3 Sandford, S. C. R., 668. By § 140, all the forms of pleading heretofore existing inconsistent with the provisions of this act are abolished, and hereafter the forms of pleading in civil actions in Courts of Record, and the rules by which the sufficiency of the pleadings is to be determined are modified as prescribed by this act." And the Code then goes on to define the functions and requisites of the new pleadings, the complaint, the demurrer, the answer, and the reply. § 156 provides that every pleading in a Court of Record must be subscribed by the party or his attorney, and when any pleading is verified, (by oath,) "every subsequent pleading except a demurrer must be verified." By § 168, every material allegation of the complaint not specifically controverted by the answer as prescribed in § 149, and every material allegation of new matter in the answer not specifically controverted by the reply as prescribed in § 153, shall, for the purposes of the action be taken as true." In regard to the subject of this treatise, the Code contains the following provision; § 276, (§22 of the Code of 1848,) "Whenever damages are recoverable, the plaintiff may claim and recover if he show himself entitled thereto, any rate of damages which he might have heretofore recovered for the same cause of action." Under the system of the common law, as I have already said, and as we shall have frequent occasion to see in the progress of this work, the rule or measure of damages depends not only on the *cause*, but on the *form* of action—that is to say, the same right may be set up in different forms, and the amount of recovery will be dependent on the form employed. It will be necessary for the pleader to bear this in mind in setting out the relief he seeks under the new system.

In Massachusetts, too, an act passed on the 28d May, 1851; Sess. Laws of 1851, C.

where, under the name of a penalty or of liquidated damages, the parties have endeavored either to fix the precise amount of compensation for the breach of contract, or at least to define some limit beyond which that compensation shall not go. The first class comprehends the great heads of assumpsit and covenant, so far as neither liquidated damages nor penalty are named in the contract, because in no case of personal actions is the rule of damages affected by the mere addition or omission of the seal, and includes suits on notes and bills of exchange, policies of insurance, on contracts for the sale and warranty of chattels, actions against common carriers, by surety

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233; entitled, "An Act to amend some of the Proceedings, Practice and Rules of Evidence of the Courts of this commonwealth," has wrought very material changes in the procedure of that State. Among the most prominent sections of the act are the following:—§ 1. "There shall be only three divisions of *personal* actions. First, *Actions of Contract*, which shall include those now known as actions of Assumpsit, Covenant and Debt, except for penalties. Second, *Actions of Tort*, which shall include those now known as actions of Trespass, trespass on the case, trover, and all actions for penalties. Third, *Actions of Replevin*." § 2. declares, among other things, that no averment shall be made which the law does not require to be proved, and that only the substantive facts necessary to constitute the cause of action, shall be stated without unnecessary verbiage and with substantial certainty; one count and no more to be inserted for each cause of action, but any number of breaches may be assigned in each count, and abolishes the action of trover. § 6. "None of the provisions herein contained shall be deemed to change any of the rules of evidence or the measure of damages." § 20. "The general issue, as heretofore used in all actions except real and mixed actions is abolished, and in place thereof the defendant shall file an answer to the declaration." § 22. The answer shall deny, in clear and positive terms, every substantive fact intended to be denied in each count of the declaration separately, "or shall declare the defendant's ignorance of the fact, so that he can neither admit nor deny, but leaves the plaintiff to prove the same." § 28. Provides a replication to the answer. § 26. Any substantive fact alleged with substantial precision and certainty, and not denied in clear and precise terms, shall be deemed to be admitted, but no party shall be required or permitted to state evidence. §§ 98, 99, 100, 101 and 102, provide for interrogatories to be administered by either plaintiff or defendant to the opposite party to be answered under oath. There are other provisions in regard to real and mixed actions, and a schedule of forms for declarations and answers is attached to the act.

Thus in two considerable States of the Union the common law forms of pleading may be said to be done away; while, at the same time, the rights of parties remain substantially as they are established and declared by that body of jurisprudence. Equitable relief is still to be given on the settled principles of equity law; and, therefore, we are still obliged to keep in mind and to understand the fundamental division between common law and equity.

Nor do any forms of action, nor the distinction between law and equity exist in Louisiana or Texas. In the latter State, in *Robbins's Adm'r vs. Walters*, 2 Texas R., 180, the court says, "The common law forms have never been observed in our courts, and with us suits are brought by petition and answer; we recognize no distinction between law and equity, and have no such actions as trover and detinue."—*S. P. Carter, et al. vs. Wallace*, 2 Texas R., 206.

against principal, those growing out of the contract of agency, and generally all agreements whether under seal or otherwise, which do not attempt to fix the damages for their violation.

A subordinate division of this class includes those cases where covenant (still without penalty or liquidated damages,) must be brought, and where assumpsit will not lie, as on charter parties, assignments of judgments, and other sealed instruments.

The second class comprehends the actions of assumpsit, debt and covenant, as controlled by penalties or liquidated damages stated in the contract. In this branch of the subject, I have treated first of the penalty and the weight given to it in fixing the measure of damages—where they fall short of it, and where they may exceed its amount, and secondly, of those cases where the agreement of the parties is conclusive on the quantum of compensation.

This disposes of the subject of actions arising upon contracts; and the remainder of the work treats of torts to persons and personal property, case, trover, replevin, and detinue, being included under this head. In this branch of the subject are embraced the actions of replevin, suits against sheriffs and public officers for breach of duty, and in general all those cases where, though the form of the action is in tort, a precise measure of damages has been adopted, or at least approached.

It will be seen that this division is very far from being altogether satisfactory. Assumpsit and case proper, assumpsit and trover, are very often coördinate remedies. The same is true of debt and assumpsit, debt and covenant; trover and trespass may often be brought indifferently, and the rule of damages, as I shall have occasion to show more fully hereafter, differs with the form of action adopted. I still hope that this arrangement will be found at once substantially convenient of reference, and adapted to the principles of the matter before us. The various heads of interest, when allowed as damages, recoupment, pleading, practice and evidence with reference to the subject of this treatise, and damages with reference to special statutes, will be found separately discussed.\*

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\* I have made one exception to the complete separation of actions affecting real and personal property, and in treating of actions for fraudulent representations on sales, have discussed both branches of the subject together.

Before entering, however, on the examination of the measure of compensation in the various cases above referred to, it will be proper to obtain a general idea of the boundaries of this branch of our jurisprudence, by investigating the rules which allow nominal damages, and those which deny relief for injury remotely resulting from the principal illegal act. Having thus ascertained what damages are given in cases where no substantial injury is done, and the general limitations imposed on the right to relief, where actual loss has been sustained, we shall be better able to enter upon the more minute inquiry which awaits us. We are, therefore, first to speak of the subject of **NOMINAL DAMAGES**.



## CHAPTER II.

### NOMINAL DAMAGES.

BEFORE proceeding to consider the measure of legal compensation in cases where actual loss is sustained, it will be proper to examine the rule of *Nominal* Damages as contra-distinguished from *substantial* Damages.

We shall have frequent occasion hereafter to notice that the common law, as a general rule, only gives actual compensation in cases of actual injury. The object of the suit is to obtain remuneration for loss actually sustained. If it appear that though the defendant is in fault, still that the plaintiff is not injured, he can have no relief. It is *injuria sine damno*. As far back as the Year Books it is said, "If a man forge a bond in my name, I can have no action on the case yet; but if I am sued, I may, for the wrong and damage, though I may avoid it by plea."\* And so Lord Hobart, C. J., says, "There must be not only a thing done amisse, but also a damage either already fallen upon the party, or else inevitable."† Equity often proceeds, *quia timet*, in the exercise of her preventive powers to arrest the threatened injury, and there were some early but now obsolete proceedings of the same character at law;‡ but, as a general rule, it may at present be considered well settled that the relief of the common law is only to be obtained by those who have suffered actual injury. This proposition is,

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\* 19 H. 6, 44.

† *Waterer vs. Freeman*, Hobart, 266.

‡ "And note," says Lord Coke, "that there be six writs in law that may be maintained, *quia timet*, before any molestation, distresse or impleading, as, 1. A man may have his writ of *memo* (whereof Littleton here speaks,) before he be distrayned. 2. A *Warrantia Cartas* before he be impleaded. 3. A *Monstraverunt* before any distress or vexation. 4. An *Audita querela* before any execution issued. 5. A *Curia Claudenda* before any default or molestation. 6. A *ne injuste vexes* before any distresse or molestation. And these be called *brevia anticipantia*, writs of prevention."—*Coke Lit.*, 100 a. *Story's Equity Jurisprudence*, §§ 780 and 825.

however, subject to the modification which we shall now proceed to consider in relation to nominal damages.

Wherever the breach of an agreement or the invasion of a right is established, the English law infers some damage to the plaintiff, and if no evidence is given of any particular amount of loss, it declares the right by awarding what it terms nominal damages, being some very small sum, as a farthing, a penny, or sixpence—*Ubi jus, ibi remedium*. “Every injury,” said Lord Holt, “imports a damage.”\* So again, in the same case as elsewhere reported, his lordship said :

“My brother Powell, indeed, thinks that an action upon the case is not maintainable, because here is no hurt or damage to the plaintiff; but surely, every injury imports a damage, though it does not cost the party one farthing, and it is impossible to prove the contrary, for a damage is not merely pecuniary; but an injury imports a damage, where a man is thereby hindered of his right. As in an action for slanderous words, though a man does not lose a penny by reason of the speaking them, yet he shall have an action. So if a man gives another a cuff on the ear, though it cost him nothing, no, not so much as a little *diachylon*, yet he shall have his action, for it is a personal injury. So a man shall have an action against another for riding over his ground, though it do him no damage, for it is an invasion of his property, and the other has no right to come there.”†

“Wherever,” says Mr. Serjeant Williams, “any act injures another’s right, and would be evidence in future in favor of the wrong doer, an action may be maintained for an invasion of the right without proof of any specific injury.”‡

In regard to the right invaded, a verdict and judgment for the smallest amount is as effectual as any sum, however large; for it establishes the fact of the plaintiff’s title. And in the common case of trespass to lands, the main object usually being to determine the right, this principle becomes very important. In many of these cases it might seem at first sight that the maxim *injuria sine damno* applied, and that the law would refuse redress. But, as has been clearly said by the Supreme Court of Connecticut, in an action for flowing lands, “An act which occasions no other damage than putting at hazard those rights,

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\* *Ashby vs. White*, 1 Salk, 19.

† 2 Lord Raym., p. 955.

‡ 1 Saunders, 846, a; *Mellor vs. Spateman*.

which, if the act were acquiesced in, would be lost by lapse of time, is a sufficient ground of action.”\*

So, again, it has been said in Maine, speaking of the flowage of lands, “Generally, when one encroaches on the inheritance of another, the law gives a right of action; and even if no actual damages are found, the action will be sustained and nominal damages recovered, because, unless that could be done, the encroachment acquiesced in might ripen into legal right, and the trespasser, by a continuance of his encroachments acquire a perfect title.”† In regard to the pecuniary result, the effect of an award of nominal damages depends on the statutes regulating costs, which are usually made to depend on the amount recovered according to the nature of the action; but this branch of the subject will be found more particularly discussed in the treatises on costs.

In an early English case, well known as that of *The Tunbridge Wells Dippers*,‡ an action on the case was brought by the plaintiffs, who were dippers at Tunbridge Wells, against the defendants for dipping without being duly appointed; and on the subject of damage “there was no proof of the defendant’s having received any gratuity other than general evidence, that the employment of dipper is attended with profits which arise from the voluntary contribution of company resorting to Tunbridge Wells.” The Court of Common Pleas, in noticing the objection, said: “There is a real damage to the dippers in depriving them of some gratuity which they would otherwise have received, perhaps more than they might truly deserve for their labor and pains. Besides, an action on the case will lie for a *possibility* of an injury, as for persuading A not to come and sell his wares at the market of B, the lord of the market may have his action.”

So, again, subsequently in an action on the case for a surcharge of common, it was held that the plaintiff need not show that he turned on any cattle of his own at the time of the surcharge, but only that he could not have enjoyed his common so beneficially as he might; and Nares, J., commenting on the

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\* Chapman *vs.* Thames Manufacturing Co., 18 Conn., p. 269.

† Hathorne *vs.* Stinson, 8 Fairf, 183. Seedensparger *vs.* Spear, 17 Maine, 123.

‡ Weller *vs.* Baker, 2 Wils., 414, Anno 1769.

Dippers' Case, said it was there held that a "*probable*" damage is a sufficient injury on which to ground an action.\* And "probable" is, perhaps, the more correct phrase. An invasion of right being shown, the law holds injury to be a *probable* result, and therefore gives judgment against the wrong doer. In other words, it presumes some damage to have resulted from the wrong. And the principle was adhered to by the King's Bench in an action on the case for injuries to a right of common, the jury having found a verdict of one farthing, and a motion to set aside the verdict and to enter a nonsuit being denied.†

But in a suit brought by the owner of a house against a lessee for opening a door without leave, the premises not being in any way injured or weakened by the opening, the court refused to allow nominal damages, and remitted the case to the jury to say whether the plaintiff's reversionary interest had, in point of fact, been prejudiced.‡ This case, however, does not present any exception to the general rule, for the court evidently considered that a verdict for nominal damages would have been right if there had been any proof of the plaintiff's *title* being affected. So, again, in the King's Bench, in an action on the case for the fraudulent imitation of the plaintiff's trade marks; the jury having found a verdict, with one farthing damages, a motion was made to enter a nonsuit, but the rule was refused, and Littledale J., said: "The act of the defendants was a fraud against the plaintiff, and if it occasioned him no specific damage, it was still, to a certain extent, an injury to his right."§

And in the same court, in an action on the case brought by a tenant against his landlord, for illegally distraining for more rent than was due, it appearing that the proceeds of the sale

\* *Wells vs. Watling*, 2 W. Black., 1288, Anno 1779. By this decision a dictum of Lord Coke, in *Robert Mary's case*, was overruled. 9 Co., 118. "So," says Lord Coke, "that if the trespass *be so small* that the commoner has not any loss, but sufficient in ample manner remains to him, he shall not have any action for it."

† *Pindar vs. Wadsworth*, 2 East., 154. We shall hereafter see that this principle does not apply in cases of waste, and that if the damages there be purely nominal, the defendant may enter judgment. *Harrow School vs. Alderton*, 2 Bos. & Pul., 86.

‡ *Young vs. Spencer*, 10 B. & Cres., 145.

§ *Blotfeld vs. Payne*, 4 B. & Adol., 410. 24 E. C. L. R., 87.

were insufficient to satisfy the rent actually in arrears, the jury found a verdict for the plaintiff, with one shilling damages. A motion was made to enter a nonsuit, but it was denied, and Denman, C. J., said: "There was a wrongful act of the defendant, and though by reason of the value of the goods taken falling short of the actual rent due, no real damage was sustained, yet there was a legal damage and cause of action, for which the plaintiff was entitled to a verdict."\* This case carries the principle of the English law to its extreme limit; for so far from the plaintiff's having proved any damage, it was conclusively shown that he could not have suffered any; and on the contrary, the defendant was the real loser.

Thus, also, it has been recently held by the English Common Pleas in an action on the case for deceit against the secretary of an insurance company for false representations as to the management and affairs of the company, whereby the plaintiff was induced to effect an insurance with them, though it did not appear that he had sustained any positive loss, that he was entitled to nominal damages.†

The principle has been applied to the diversion of water courses. It has been long held that the riparian proprietor of a stream has a right to the use of its waters, but it has been doubted whether he could recover in an action for its diversion without showing actual damage.‡ It is now, however, well settled in favor of the right, and if the infringement be established, nominal damages, at least, will in all cases be given.§

The general rule has been recognized by the Supreme Court

\* *Taylor vs. Heniker*, Bart., 13 Adolphus & Ellis, 488, which overruled the cases of *Avenell vs. Croker*, Moo. & M., 172, and *Wilkinson vs. Terry*, 1 M. & Rob., 377. See also, *Butts vs. Edwards*, 2 Denio, 164, where it is said that in case for illegal distress, if no actual damage is sustained, the plaintiff could at most but recover nominal damages.

† *Pontifex vs. Bignold*, 8 Scott N. R., 390. The text contains the substance of the marginal note, but it should be noticed that the question came up on demurrer to the plea, that the declaration alleged that the policy was of less value to the plaintiff than if the representations complained of had been true, and that Tindal, C. J., said, "This case ranges itself within *Pauley vs. Freeman*, 8 T. R., 51, and *Haycraft vs. Cressy*, 2 East, 92, and that class of cases where it was held, that a false affirmation made by the defendant with intent to defraud the plaintiff, whereby the plaintiff receives damage, is the ground of an action upon the case in the nature of a deceit."

‡ *Hill vs. Mason*, 5 Barn & Adol., 1.

§ *Bowen vs. Hill*, 1 Bing. N. C., 549. *Parker vs. Griswold*, 17 Conn., 238. *Plumleigh vs. Dawson*, 1 Gilman, 544.

of New York, in relation to personal actions as well as those affecting real property. In an action of trespass,\* Bronson, J., said, "If the plaintiff succeeded in showing an unlawful entry upon his lands, or that his fences or any portion of them were improperly thrown down and his fields exposed, he was entitled to a verdict for *nominal damages* at the least. It was not necessary for him to prove a *sum*, or that any particular amount of damages had been sustained. Every unauthorized entry upon the land of another is a trespass, and whether the owner suffer much or little, he is entitled to a verdict for some damages."†

So in an action of trespass for false imprisonment.‡ The plea containing an allegation that the trespass consisted in arresting the plaintiff on an execution on a judgment in trover; it was replied that the plaintiff had obtained his discharge from imprisonment, and that the defendant had notice of the discharge, to which a demurrer was put in; the court said: "Want of notice may indeed depress the damages to a mere nominal sum, but is never allowed absolutely to excuse a trespass;" and there was judgment for the plaintiff.

In a recent case, where fraud was charged, the same court was equally explicit. They said, "Actual damage is not necessary to an action. A violation of right, with a possibility of damage forms the ground of an action. \* \* Once establish, therefore, that in all matters of pecuniary dealing, in all matters of contract, a man has a legal right to demand that his neighbor shall be honest, and the consequence follows, viz: if he be drawn into a contract by fraud, this is an injury actionable *per se*. Indeed, it would not be difficult in all such cases, to show the degree of actual damage. The time of the injured party has been consumed in doing a vain thing or one comparatively vain, and time is money. Fraud is odious to the law, and fraud in a contract can hardly be conceived of without being attended with damage in fact."§

So in Connecticut, in an action of slander, for charging the plaintiff, a female, with want of chastity, the judge directed the

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\* Dixon *vs.* Clow, 24 Wend., 188.

† And the same point has been ruled in Texas. Carter et al. *vs.* Wallace, 2 Texas R., 206.

‡ Deyo *vs.* Van Valkenburgh et al., 5 Hill, 242.

§ Allaire *vs.* Whitney, 1 Hill, p. 484. See Whitney *vs.* Allaire, 4 Denio, 554.

jury "that if they should find that the plaintiff had so destroyed her character by her own lewd and dissolute conduct as to have sustained no injury from the words spoken by the defendant, they might give only nominal damages,"\* and on review this was held correct.

The general principle has been also laid down by Mr. Justice Story, in regard to patents. In an action for the infringement of a patent right by making a machine, it was argued for the defendant, that no action lay except for actual damage. "But," said Story, J., "we are of opinion that where the law gives an action for a particular act, the doing of that act imports of itself a damage to the party. Every violation of a right imports some damage, and if none other be proved, the law allows a nominal damage."†

So, in Pennsylvania, in trespass for flowing lands, it was held "that the law implies damage from flooding the ground of another, though it be in the least possible degree, and without actual prejudice. But where the law implies the injury, it also implies the lowest damage."‡ In the Maine Circuit, in an action on the case for flowing lands,§ Mr. Justice Story also recognised the rule.

So it has been held in Massachusetts, in the case of a sheriff neglecting to return an execution. "The plaintiff is entitled," said Wilde, J., "to nominal damages for the officer's neglect, in not returning the execution till after the return-day. No actual damages are proved, but where there is a neglect of duty, the law presumes damages."||

So where the sheriff does not return a fi. fa., after being notified to do so, if the plaintiff has intermeddled with the execution of the writ so as to defeat its operation, he is still entitled to nominal damages.¶ We shall have occasion to consider this branch of the subject more at large when treating of damages in suits against sheriffs and other public officers.\*\*

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\* *Flint vs. Clark*, 18 Conn., 361.

† *Whittemore vs. Cutter*, 1 Gall., 429, and again S. C., *ibid.*, 433.

‡ *Pastorius vs. Fisher*, 1 Rawle, p. 27; affirmed in *Ripha vs. Sergeant*, 7 Watts & S., p. 9.

§ *Whipple vs. Chamberlain Manufacturing Company*, 2 Story, p. 661. See, also, *Crooker vs. Bragg*, 10 Wend., 260.

|| *Lafin vs. Willard*, 16 Pick., p. 64. See, also, *Goodnow vs. Willard*, 5 Met., p. 517; and *S. P. Lawrence vs. Rice*, 12 Met., 535.

¶ *Mickles vs. Hart*, 1 Denio, 548.

\*\* Post, Ch. XXI.

But, in Vermont, an able effort has been made to limit nominal damages strictly to cases where some damage is the probable result of the defendant's act, or where the act would be evidence afterwards in favor of the wrong doer, or where a right is wantonly invaded for the purpose of injury, and it is said "that no case can be found where damages have been given for a trespass to personal property, when no unlawful intent or disturbance of a right or possession is shown, and where not only all *probable* but all *possible* damage is expressly disproved."\* I doubt if this doctrine can be sustained on the authorities, but it is founded in good sense and correct notions of justice.

In Massachusetts, though an officer who takes a bail bond, is liable to an action for not returning it with the writ, yet if he deliver, or offer to deliver it to the plaintiff in season for him to prosecute a *scire facias* against the bail, he is liable for nominal damages only.†

So, in New Hampshire, when the sheriff attaches property on mesne process, the return of the attachment and receipt taken for it, should specify the articles attached; but neglect in this respect, will subject the officer to nominal damages only, unless special damage is shown.‡

The rule that the invasion of a right gives a claim in all cases to nominal damages, applies equally to matters of contract, and so it was held by the Court of King's Bench, in an action brought against a banker, for refusing payment of a check, although in funds, no actual damage being sustained.§

In an action brought to recover general average, the jury being about to pronounce a verdict for the defendant, because they could not ascertain any given sum to be the proportion due to the plaintiff, a nonsuit was taken, and on motion, the Court of Common Pleas ordered a verdict to be entered for the plaintiff, with sixpence damages.||

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\* Paul *vs.* Slason, 22 Verm., 281, per Poland, J.

† Glezen *vs.* Rood, 2 Met., p. 490.

‡ Bruce *vs.* Pettengill, 12 N. H. R., 841.

§ Marzetti *vs.* Williams, 1 Barn. & Adol., 415. See, also, Bowman *vs.* Brown, in the Exchequer Chamber, 3 B., 525, 526, affirming the doctrine of Marzetti *vs.* Williams, and also Winterbottom *vs.* Wright, 10 Mees. & Wels., 109.

|| Feize *vs.* Thompson, 1 Taunt., 121.



In a recent cause in the Queen's Bench,\* the power of the court over this subject was much considered in a mandamus case, and it was held that the judge who tried the cause might, from his recollection, order a verdict to be entered for nominal damages, though the entry at the time was only "verdict for the crown."

But when the debt was paid, though after maturity, it was held to support a plea that it was paid in full satisfaction of debt and damage, and the plaintiff was not allowed to recover either interest or nominal damages.† And so, again, in assumpsit, where the defendant, on being applied to by the plaintiff for payment of interest, stated that he would bring her some on the following *Sunday*; it was held that though this was an admission that something was due, still, as it did not appear what the nature of the debt was, or that it was due to the plaintiff as executrix, or in her own right, or that it was a debt for which assumpsit would lie, the plaintiff was not entitled to recover even nominal damages, and a nonsuit was entered.‡

The same principle, in regard to contracts, has been generally recognized in this country. So in an action of covenant, the Supreme Court of New York held that the plea of *non est factum* admits a breach on the part of the defendant, and throws on him the onus of showing the contrary, but that such admission only entitled the plaintiff to nominal damages.§ And in an action on the common money counts,|| the same court held that if in assumpsit an issue be joined on a plea of payment, and no evidence be given at the trial by either party, the plaintiff will be entitled to a verdict, but such verdict will only be for nominal damages.

So in Massachusetts, it has been decided that the omission of an administrator to settle his account with the probate court, renders him at all events liable to nominal damages.¶ So in the same State, the damages in a suit on the covenant against

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\* *Regina vs. Fall*, 1 Queen's Bench Reports, 686. See many cases cited by Sir J., now Lord Campbell, in his argument in this cause.

† *Beaumont vs. Greathead*, 2 Man. Gr. and Scott, 494.

‡ *Green vs. Davies*, 4 B. & Cres., p. 235; and, also, *Teal vs. Auty*, 2 Bro. & Bing., 99. See *vide contra* at *Nisi Prius*, *Dixon vs. Deveridge*, 2 Car. & P., 109.

§ *Goulding vs. Hewitt*, 2 Hill, 644.

|| *The New York Dry Dock Co. vs. McIntosh*, 5 Hill, 290 and 505.

¶ *Fay vs. Haven*, 8 Metcalf, 109.

incumbrances are merely nominal, if the plaintiff has paid nothing towards the incumbrance.\*

So in Maine, in a suit growing out of an attachment, the goods having been delivered to a receiptor and he having failed to perform his duty, it was said that if there was a good cause of action, at the time of the commencement of the suit, but the right of action is lost by a neglect to take the necessary steps to preserve the attachment, nominal damages may be recovered.† So in the same State, in an action on a bond given to procure the release of a debtor from arrest, there being no evidence of the loss sustained by the plaintiff, it was held that the execution could issue for nominal damages only.‡

So in Mississippi, in an action on a covenant to transfer to the plaintiff the defendant's *title* to a slave, it was held that the measure of damage was not the value of the slave, but of the defendant's title, and that appearing to be defective, it was considered a case for only nominal damages.§

So in Louisiana, in a suit against the sureties on a sequestration bond.||

But in a somewhat peculiar case, in an action of debt where a nonsuit had been taken, although the Supreme Court of New York were satisfied that the verdict should have been for the plaintiff, yet as no damages were shown, nor any mode of arriving at any, the court refused to set aside the nonsuit and grant a new trial in order to give the plaintiff an opportunity to obtain nominal damages.¶

The importance of the principle of nominal damages is, as has been said, mainly its effect upon the costs of the suit. Thus, in Massachusetts, a plaintiff is entitled to full costs in personal actions, in which the title to real estate may be commenced, if he recover any sum less than twenty dollars.\*\* Its practical results, therefore, can only be understood by a careful analysis of the statutes of costs, of the details of which, being matters of local legislation, this work cannot properly treat.

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\* *Tufts vs. Adams*, 8 Pick., 547.

† *Moulton vs. Chapin*, 28 Maine, 505.

‡ *Waldron vs. Berry*, 22 Maine, 486.

§ *Whitehead vs. Dunbar*, 11 Smede and Marsh, 98.

¶ *Clark vs. Scott*, 2 La. Ann. R., 907.

¶ *Brantingham vs. Fay*, 1 J., Cases, 255.

\*\* Revised Statutes of Mass., c. 121, §§ 3 and 4. *Ryder vs. Hathaway*, 2 Met., 96.

Where the action is brought to prevent trespasses, to try titles to land, or to determine rights of any kind, it is very equitable that the party in the wrong should bear the expense of the controversy; but in most other cases, the rule of nominal damages, provided they carry costs, only tends to engender litigation.

We shall have occasion hereafter to notice this more particularly, but it should be borne in mind, that the rule of nominal damages, unless carefully limited to cases where a right is necessarily litigated, results in gross injustice. It is of no consequence whether a claim to real or to personal property is in question, the defendant ought not to be charged with the costs of the proceeding, if the suit be either malicious or unnecessary. The law should hold out no inducement to useless or vindictive litigation.\*

Having thus stated the rule of damages where no actual loss is sustained, we now proceed to ascertain the extreme limits of legal relief where positive injury is done; and for that purpose shall next examine the subject of REMOTE AND CONSEQUENTIAL DAMAGES.

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\* I am happy to find this language cited with approbation in Vermont, in *Paul vs. Slason*, 22 Verm., 281, per Poland, J.

The case of *Hall, App't, vs. Ross, Resp't*, 1 Dow, 201, presents, in a striking point of view, the difference between the Scotch and English law, on the subject of nominal damages. It was a suit growing out of a lease of certain salmon fishing stations, which had been disturbed by the erection of a dock. In the Scotch court, the judges (fourteen in number,) were equally divided. Of the seven who decided against the claim, four were satisfied that the appellant had sustained damage, but apparently thought the damage could not be ascertained, and judgment was given against the party claiming, with costs. The Lord President, however, said that in several actions usual in Scotland, they were under the necessity of "conjecturing the damages."

On appeal to the House of Lords, Lord Eldon said: "If, in England, a majority of the judges had been of opinion that some damages were due, their lordships would never have heard of the decision being against the person who had made out his claim to damages. Too much might be given him, or too little; but he could never, under such circumstances, be dismissed out of court, with the additional loss of having to pay the expenses of the suit. It might be very difficult to ascertain the amount of the damage, and in this country there were two modes of proceeding in such cases, viz., to prove the amount by the testimony of competent witnesses, or when there was no ground or criterion to estimate the damage, they were in the habit of giving nominal damages, but they never dismissed the claim altogether when it appeared that there was some damage." And the judgment was reversed, with instructions: *First*, that if damages had been sustained, compensation was due. *Second*, that the party should furnish further proof, and if not, that the court should ascertain the amount of damages by such other means as their practice should authorize, and then to do what was fit and just.

## CHAPTER III.

### REMOTE AND CONSEQUENTIAL DAMAGES.

No compensation allowed in damages, but for the direct and immediate consequences of the act complained of—French Law on this subject—Scotch Law—The Common Law—What are considered direct and immediate consequences—Loss of profits—As between principal and surety—Statutes—Counsel fees—Damages arising after suit brought—Prospective damages—Liability of grantees of franchises for consequential damages.

HAVING in the last chapter stated the measure of damages where no actual loss is sustained, I now proceed to exhibit the general rule which fixes the limit of compensation in cases where positive injury results from the alleged wrong. That rule is the one which prohibits any allowance for damages remotely resulting from the principal illegal act. Such damages are frequently termed *remote damages*, and sometimes *consequential damages*. These terms are not, however, necessarily synonymous, or to be indifferently used. All remote damages are consequential, but all consequential damages are by no means remote.

We shall have frequent occasion to notice the existence of this principle hereafter, when examining more minutely the rules of damages in particular cases, but it is proper before entering on that part of the subject, to have an idea of the general boundaries of this branch of our jurisprudence.

It has already been stated, that the law does not aim at complete compensation for the injury sustained; that it seeks rather to divide than to satisfy the loss, and that in cases of contract, as well as of tort, where no question arises of fraud, malice or oppression, the direct pecuniary damage with the costs of the litigation form the measure of relief. In other words, the law refuses to take into consideration any damages remotely resulting from the act complained of. This proposi-

tion, or one correlative to it, is expressed in the maxim *Causa proxima, non remota spectatur*; or, in the language of Lord Bacon, "It were infinite for the law to judge the causes of causes, and their impulsion one on another. Therefore, it contenteth itself with the immediate cause, and judgeth of acts by that without looking to any further degree."\* This general principle pervades the civil as well as the common law, and applies equally to cases of breach of contract, and of violation of duty; to all cases, in short, where no complaint is made of any deliberate intention to injure. In these latter cases we have seen that our law does not pause at the line of mere compensation, but proceeds to punish the offender.

The language, however, held on this subject, and the reasons assigned for the disregard of remote damages, are far from being uniform. In regard to contracts, it is sometimes said that the defendant shall be held liable for those damages only which both parties may be fairly supposed to have contemplated at the time they entered into the agreement, as likely to result from it; and this appears to be the rule adopted by the writers of the modern civil law. Thus Pothier† puts the case of an agreement for the sale of a horse, and failure to deliver. If in this instance horses have risen in price, the purchaser has a claim for what he has been obliged to give for a similar animal, over and above the price at which he was to have that of the seller; and this, in the language of the Roman Law, he terms the damages *propter rem ipsam non habitam*.

But on the other hand, if the purchaser were a canon of the church, and by reason of the non-delivery of the horse, could not arrive at his residence in season to receive his *gros fruits*, (or tithes,) the seller is not liable for the loss of those *gros fruits*, because this accident was not foreseen at the time of the contract.

So in case of a letting of a house for a given term, say eighteen years, which the letter in good faith, supposes his, and if at the end of ten or twelve years the lessee is evicted by the true owner, the lessor is liable for the damages resulting from the expense of moving, and the rise of the rent of similar tene-

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\* Maxims of the Law, Regula 1.

† *Traité des Obligations*, Part I., Ch. II., Art. III., § 16, et seq.

ments; these are *propter rem ipsam non habitam*. But he is not liable for an injury done to a business established in the house by the lessee subsequent to the letting, nor for furniture injured in the removal; this is damage that could not have been contemplated at the time of the contract.

But if, on the other hand, the horse above referred to had been sold for the express object of enabling the canon to arrive in time for his *gros fruits*, or the building had been let for the express object of carrying on a particular business, then the injuries which otherwise would be too remote, become direct and immediate, and constitute a valid claim, as forming part of the contract between the parties.

So if one, not a carpenter, sell timber which the purchaser uses to prop up his building, and by reason of the timber being defective, the building fall and be destroyed; if the seller acted in good faith, and was ignorant of the defect, he will only be liable for the difference in price between good timber and that sold. If, however, the seller was a carpenter who sold the timber for the express purpose of propping up the house, then he shall be held liable for all damage done the building. But again, if the timber be sold to be used in reference to a particular building, and it be used for one larger and more valuable, even if it were insufficient for a smaller one, the seller shall only be liable for the value of the smaller building.

So, again, in the second case, the seller of the timber is only liable for the building itself, and not for furniture in it at the time of its destruction.

But if an architect contract to erect a building, and by reason of his negligence it fall, he shall be liable for the furniture as well as the building, because it is to be considered that the architect must have been aware that the building would be used for holding furniture. But he is not liable for jewelry and manuscripts of great or extraordinary value.

In cases of fraud, the civil law made a broad distinction. In such cases the debtor was liable for all the consequences of his fraud, not only of those *propter rem ipsam*, but all others, for he who commits a fraud is bound *velit, nolit*, to repair the wrong caused thereby.

For instance, if a cow tainted with an infectious malady, is fraudulently sold, the seller will be liable, not only for the ani-

mal itself, but for the others destroyed by the spread of the contagion. But Pothier is of opinion that there is still a limit to this liability, and he puts the case of a similar contagious disease, and supposes that in consequence thereof the purchaser is prevented from cultivating his lands, by means whereof his payments are suspended, his property is seized, and he is thrown into prison; he considers it clear in this case, that the seizure of property is not to be charged to the fraudulent sale; doubts, also, if the being prevented from cultivating the property should enter into the consideration of damages, and thinks, at all events, it should only do so in part.

The modern French law, as declared in the Napoleon Code, contains the recognition of the same general principles. "The damages due the creditor, consist in general of the loss that he has sustained, and the profit which he has been prevented from acquiring, subject to the modifications hereinafter contained."

"The debtor is only liable for the damages foreseen, or which might have been foreseen at the time of the execution of the contract, when it is not owing to his fraud that the agreement has been violated.

"Even in the case of non-performance of the contract, resulting from the fraud of the debtor, the damages only comprise so much of the loss sustained by the creditor, and so much of the profit which he has been prevented from acquiring, as directly and immediately results from the non-performance of the contract."\*

Two prominent points of difference will be borne in mind, between the principles of the modern civil system as thus laid down, and those of the common law, which arise mainly from the arbitrary character of our forms of action. By those forms

\* The language of the Code is as follows: "Les dommages et intérêts dus au créancier sont, en général, de la perte qu'il a faite, et du gain dont il a été privé, sauf les exceptions, et modifications ci-après.

"Le débiteur n'est tenu que des dommages et intérêts qui ont été prévus ou qu'on a pu prévoir lors du contrat, lorsque ce n'est point par son dol que l'obligation n'est point exécutée.

"Dans le cas même où l'inexécution de la convention résulte du dol du débiteur, les dommages et intérêts ne doivent comprendre à l'égard de la perte éprouvée par le créancier, et du gain dont il a été privé, que ce qui est une suite immédiate et directe de l'inexécution de la convention."—*Code Civil, Liv. III., Tit. III., sect. 1149, 1150, 1151.*

of action, contracts and wrongs are intended to be kept wholly distinct. In case of a breach of contract, (with the single exception of promises to marry,) the animus or intention of the party in default, as a general rule, is entirely immaterial, and whether the non-performance of the agreement result from inability or deliberate malice, the rule of damages is the same. On the other hand, in cases of fraud or vexation, as has been already repeatedly said, compensation is blended with punishment, and the jury left largely to their discretion.

It will be perceived that the above provisions of the French code recognize the same principles as those which we have illustrated by the extracts from Pothier, and which are, in fact, nothing else as to the leading principle than a repetition of the general language of the Roman law, "*quantum mea interfuit : id est quantum mihi abest, quantumque lucrari potui.*"\* It is difficult, however, to understand practically what rules the civil or the French law intends to lay down, as they are subject to the arbitrary discretion already often noticed. A recent, and very able commentator on the Code, holds this language :

"There is nothing more abstract than the subject of damages ; the law, therefore, has only been able to lay down general principles, leaving the wisdom of the tribunals to apply them according to the circumstances and the facts of the case ; and though it establishes that in general, damages consist of the loss which the creditor has suffered, and the profit of which he has been deprived, nevertheless the judge should be more moderate in granting large damages for profits prevented than for loss actually sustained ; the *lucrum cessans* is generally less calculated to excite the solicitude of the judge, than the *damnum emergens*, and too much rigor on this branch of the subject would degenerate into injustice. *Summum jus summa injuria.* Such is the general opinion of our authors."†

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\* L. 18, ff. *ratam rem hab.*, and see *Supra*, p. 24.

† "Il n'est pas de matière plus abstraite que celle relative aux dommages-intérêts ; aussi la loi n'a-t-elle pu tracer que des principes généraux en s'en remettant à la sagesse des tribunaux pour leur application selon les circonstances et les faits de la cause. Et quoiqu'elle établisse que les dommages-intérêts sont en général la perte que le créancier a éprouvée et le gain dont il a été privé, néanmoins le juge doit être plus réservé à en accorder de considérables pour le gain manqué que pour la perte réellement éprouvée ; le *lucrum cessans* est généralement moins susceptible d'exciter sa sollicitude que le *damnum emergens*. Et c'est en cette matière que trop de rigueur dégènerait sou-



Another very eminent commentator on the Code, in order to illustrate the general principle in regard to remoteness of damage, puts the case of a contract by which Titius is to let a sufficient number of vehicles on a given day, for the vintage of a certain vineyard remote from my domicile, and whither I have proceeded to prepare for the work, and hired my hands. Titius failing to furnish the vehicles, I am compelled to dismiss my hands and postpone the vintage. A day or two after a hail storm takes place and destroys the whole crop which I have sold to pay my creditors; owing to their not being paid, my property is seized and I am driven into bankruptcy.

The question is then asked, What does Titius owe; does he owe me the value of my crop in whole or in part? Should he indemnify me for the loss of my property and my consequent insolvency?

And the learned writer decides as to the latter head of damage, that Titius is not responsible. He pronounces it too remote a loss. It is the direct and immediate result of the bad state of my pecuniary affairs which Titius had no means to foresee, and which he was not bound to consider. As to the loss of the crop, he proceeds to distinguish between bad faith (*dol*, *mauvaise foi*) and inability. If the failure to perform the contract was owing to the latter, then, though Titius is in fault, still, as it is not in consequence of his bad faith that the contract has been broken, he is, by the provisions of the code above cited, only liable for the damages which were foreseen, or which might have been foreseen at the time, and it could not be anticipated that the day after that fixed upon, a hail storm would destroy my crop.

But on the contrary, if the non-performance was owing to bad faith, then the same author considers Titius liable for the loss of the crop, because it cannot reasonably be denied that this loss is an immediate and direct result of the non-performance of the contract. If it be said that the immediate and direct *cause* of the loss of my crop was the storm, and not the fault of Titius, the answer is, that to render the debtor acting in bad faith responsible for damages, the Code (Art. 1151,) does not

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vent en injustice. *Summum jus summa injuria*. Tel est le sentiment commun des auteurs."—*Duranton. Cours de Droit Français*, Vol. X., n. 480 and 481.

require that the non-performance of the contract should be the *immediate and direct cause* of the damage, but only that the damage should be the *immediate and direct result (suite)* of its violation, which is a very different thing.\*

This case, again, well illustrates the difference between the French system and our own in regard to damages. With us, as a general rule, no discrimination is made in regard to contracts as to the motive which produces their non-performance. So in this instance, whether Titius was actuated by a fraudulent or a malicious purpose, no action could be maintained but for a breach of contract, and in that action I apprehend that the damage resulting from an extraordinary hail storm would be considered altogether too remote to be allowed as damages. On the other hand, however, if Titius, instead of violating an agreement had committed a malicious trespass, as by removing the vehicles prepared for the vintage, the jury might give damages in their discretion to punish the offence.

Another case from the same commentator will illustrate the extent to which the civil law goes in quest of resulting damage. If, for instance, an architect who has contracted to build a house by a given time for a given tenant, constructs it so ill that a part of it falls down, this causes three sorts of loss; the expense of rebuilding; the rent that the proprietor might have received; the damage done the tenant; and though the second and third class appear remote, yet, as they are caused by the act of the contractor, they should be charged to him. And there is even a fourth class of loss for which he should answer, that of the furniture in the house, and which could not be saved, for the architect must be presumed to know that the house would contain furniture; but he is not responsible for jewelry, or things of extraordinary value, unless indeed there was a deliberate design to injure.

Toullier proceeds to say that in this case, and in many others, the damages might be so enormous as to ruin the party charged, although he was acting in entire good faith, and that hence Domat has been induced to adopt the principle that the

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\* Toullier, *Droit Civil*, Liv. III., Tit. III., Chap. III. De l'effet des Obligations, § 284, et seq., Vol. VI., p. 290, et seq.

*architects able to meet these losses* should be charged with them, but that inasmuch as contractors have not always the means to make such complete remuneration, and as humanity should moderate the rigor of extreme justice, this kind of damages should be regulated by discretion.

Toullier, however, vigorously combats what he pronounces a false and dangerous doctrine, and which, he says with extreme good sense, would result in different judgments of the same cause, according to the fortune of the debtor.

The discussion is curious as going to illustrate the apparent absence of any fixed measure of damages in the French law, and the caution with which its authors should be consulted on questions connected with this branch of jurisprudence.\*

Having thus rapidly exhibited the rules of the French and Modern Civil law as to remote and consequential damages, we turn to other systems.

One of the most eminent authors of the Scotch jurisprudence,† divides resulting damage into *certain* and *uncertain*; certain, as the loss of rent consequent on the destruction of a house; uncertain as the profit that might have been made upon property of which the owner has been robbed.

Certain consequential damage is, he says, always allowed by a court of law. Uncertain damage will be allowed by a court of equity, where a criminal act is the cause of the loss, and this, because the criminality throws the burthen of proof on the delinquent, and he is charged with every probable item of profit, unless he can give conclusive evidence that no profit could have been made. But I apprehend with us that no dis-

\* The vagueness of the French system in this respect dates, as we have already seen, from an early period of their jurisprudence. One of the best authors of their ante-revolutionary law says: "Nothing is more arbitrary than the amount of damages." But the whole clause is worth extracting.

"Pour les dommages et intérêts ils dependent toujours des circonstances du fait; c'est pourquoi il n'y a rien de plus arbitraire, et l'on voit tres souvent des juges que les fixent à une somme si modique qu'ils ne vont pas a recompenser la dixieme partie de ceux qui ont ete soufferts par la partie a laquelle ils sont adjugés; ces sortes d'indulgences ne sont pas seulement contraires au bien des particuliers, mais elles nuisent encore davantage au bien public, puis qu'elles fomentent les violences et la mauvaise foi par l'esperance d'impunité."—*Argou. Institution au Droit François, Paris, 1787, Liv. IV., c. 17.*

† Lord Kaims' Principles of Equity. 2d edit., 1767, p. 77, Book I., Part I., Ch. I., § V.

tion exists between the rules of equity and law on this subject.\*

In regard to acts merely culpable and not criminal, or when fault exists without malice, the same writer declares that uncertain consequential damages cannot be allowed.†

So of the *pretium affectionis*, or value set upon the injured property by its owner, over and above its intrinsic or market value, he holds that it is not to be allowed unless the injury is intentional.

The general principles of the civil law have been repeatedly recognized in our own jurisprudence, though the language employed to define the limits of damage has not been uniform. It has been sometimes said by the courts which follow the course of the common law, that no allowance could be made for *remote* or *consequential* loss; sometimes that the damages to be compensated must be the *proximate* and *natural* consequence of the act complained of.

"Where the action," says the Supreme Court of New York,‡ "is for the breach of a contract, and no special damages are stated in the declaration, the plaintiff is confined in his recovery to such only as naturally arise from the breach complained of; but if the damage claimed do not *naturally* arise from that fact, they cannot be recovered *unless they are particularly stated in the declaration*, and not then *if they are not proximate*. Consequential damages may naturally arise from the mere breach of a contract, but they often depend on the peculiar circumstances of the case. Such are allowed without being stated in the pleadings, as *are the fair, legal, and natural result* of the breach of the defendant's agreement; if they *do not thus result*, the jury cannot allow them, unless they are stated in the declaration, and established by proofs." Here it is said that damages not "*naturally*" arising from the defendant's act can be recovered, provided they be "*proximate*," and that though such damages be not the "fair, legal, and natural" result of the breach of contract, still, they can be allowed for if alleged

\* The question whether, in awarding damages, there be any difference between a court of equity and a court of common law, is considered by Lord Kaimes, Book I., Part I., Ch. IV., § V., p. 159.

† Book I., Part I., Ch. IV., § V., p. 160.

‡ Marcy, J., in *Armstrong vs. Percy*, 5 Wend., pp. 535, 538.

and proved. It may be well doubted, whether any damages not "naturally" resulting from the alleged grievance can ever be considered *proximate*, or whether they can be taken into consideration at all by the tribunal.

Mr. Greenleaf has said with more accuracy,\* "the damage to be recovered must always be the *natural and proximate* consequence of the act complained of." But it is far easier to lay down a general proposition, than to apply it to a particular case. When we come to analyze causes and effects, and undertake to decide what is the natural result of a given act, and what is to be regarded as unnatural—what is proximate and what remote, we shall find ourselves involved in serious difficulty. Many things are perfectly natural, and yet very remote consequences of a particular act; many other results are proximate, nay, immediate, and yet so little to be expected that they can scarcely be pronounced natural. Nor does the requirement that the damage be both natural and proximate, relieve us from the difficulty.†

The rule is not much more definite when it is said that the damages must be the *legal and natural* consequence of the act complained of. As in a case‡ in which the defendant had slandered the plaintiff, who was employed by one J. O. as a journeyman for a year, at certain wages, by saying that he had cut certain flocking cord, and the plaintiff claimed special damages for his discharge by J. O. in consequence of the slander, before the expiration of the year, it was held by Lord Ellenborough, that the discharge of the plaintiff by J. O. was a mere wrongful act, and not "the legal and natural consequence of the slander complained of."§

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\* Evidence, Vol. II., p. 210.

† In Alabama, the phrase "natural and proximate consequence," has been cited with approbation in a case of malicious prosecution, *Donnell vs. Jones*, 18 Alabama, 490. But in truth the question of the remoteness or consequentiality of damage often loses itself in the most metaphysical regions of cause and effect. The reader of Plutarch will remember the charge brought against Pericles, by his son, Xanthippus, who said "that Epitimus, the Pharsalian, having undesignedly killed a horse with a javelin that he threw at the public games, his father spent a whole day in disputing with Protagoras, which might be properly deemed the cause of his death, the javelin, or the man that threw it, or the president of the games."

‡ *Vicars vs. Wilcocks*, 8 East, 1.

§ In *Kelly vs. Partington*, 5 B. & Adol., 845, an action of slander for words of ambiguous meaning, and to which no interpretation was given by innuendo, it was

In a recent case in Louisiana, it is said, recognizing the authority of Pothier and Toullier, that "the damages which a party can recover on the breach of a contract, are those which are incidental and caused by the breach, and may reasonably be supposed to have entered into the contemplation of the parties at the time of the contract;"\* and this is perhaps the clearest and most definite line that can be drawn in the matter.

Having thus briefly stated the general principles of the civil law, and of those systems of jurisprudence which recognize the authority of the same rules, a more accurate notion will be had of their application and true meaning, by a review of some of the various cases in which they are exhibited; first, grouping together those cases where damages have been denied, as being too remote and indirect; and secondly, examining those cases where more liberal allowances have been made.

In England, the subject seems to have been first examined in connection with the forms of action. The original distinction between trespass and case was, that where the injury was immediate the former would lie, where consequential, case only; and hence it often became indispensable to determine to which class particular kinds of damage should be held to belong. So in the famous squib case, where the defendant threw a squib into a Market-house, which fell on the stall of a gingerbread seller; he, to save himself, threw it on another stall; the proprietor of the second stall also threw it off, and in so doing it struck the plaintiff and put out his eye; here it was held that the injury was the direct and immediate act of the defendant, and that trespass would lie.† We are now to examine an analogous class of questions, but without reference to any technical form of action.

A preliminary question arises on the pleadings, because in many cases the recovery of special or resulting damages depends on the proper averments in the declaration. This is a branch of our subject which will be treated of more fully here-

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said, by Taunton, J., "in order to make the words actionable, they must be such that special damage may be the *fair and natural result* of them; and by Patteson, J., "I have always understood that the special damage must be the *natural* result of the thing done."

\* *Williams vs. Barton*, 18 Louisiana R., 404.

† *Scott vs. Shepherd*, 2 W. Black, 692. *Vandenburgh vs. Truax*, 4 Denio, 464.

after, under the head of Pleading.\* Mr. Chitty says,† “Such damages as may be presumed necessarily to result from the breach of contract, need not be stated with any great particularity in the declaration. But in other cases it is necessary to state the damages resulting from the breach of contract specially and circumstantially, in order to apprise the defendant of the facts intended to be proved, or the plaintiff will not be permitted to give evidence of such damages on the trial.”‡

So in an action for a nuisance, resulting from an obstruction to a water course, caused by the erection of a mound of earth, and it appearing that the defendants did not erect the mound in a way to obstruct the course, but that the earth had mouldered and been trodden down by third persons, so as to intercept the water, the court said that the evidence did not support the declaration. “The statement in the declaration is, that the rubbish itself was placed by the company in a situation such as to obstruct the ditch. It is, however, the elements and the boys that have changed its position and caused it to obstruct the ditch. It was not the immediate act of the defendants, but a consequential injury that occasioned the obstruction.”§

But supposing the damages properly and completely averred, the question yet remains; for though fully alleged, the right to recover is still to be determined.

It is very difficult to group the cases together, as each turns generally on its own merits; but we will first examine to what extent the loss of prospective profits is considered a subject of compensation. In the civil law, we have seen that they are generally allowed, but the tendency of our law is to a contrary result, though this is by no means a rule without exception.

Where the plaintiff bought the unexpired term of a lease for £270, and paid a deposit of £54; the title proving defective, the plaintiff insisted on recovering as damages, not only his deposit, but damages sustained by the loss of the bargain, and also by reason of his having sold out stocks to pay the purchase money, and the jury gave a verdict for £74 15s. 6d., being the deposit with interest, and £20 extra damages.

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\* Vide post, Ch. XXIV.

† Pleadings, I., 871.

‡ See, to same point, *Deforest vs. Leete*, 16 Johns., 122.

§ *Fitzsimons vs. Inglis*, 5 Taunt., 584.

But on motion a new trial was ordered as to the loss of the bargain; and De Grey, Ch. J., said: "Upon a contract for a purchase, if the title proves bad, and the vendor is, without fraud, incapable of making a good one, I do not think that the purchaser can be entitled to any damages for the fancied goodness of the bargain which he supposes he has lost." And as to the sale of the stocks, Blackstone, J., after remarking that the facts did not show any loss, said: "not that it is material, for the plaintiff had a chance of gaining as well as losing by a fluctuation of the prices."\*

This case has frequently been referred to as amounting to a general denial of a right to recover profits. But it is not an authority to that extent; it is put by Mr. J. Blackstone, in his opinion, on the ground that "contracts of this kind are merely upon condition, frequently expressed, but always implied, that the vendor has a good title." And where the grantor in such case has full knowledge that he has not title, damages resulting from the loss of the bargain have been allowed.†

Both the English and American courts have generally concurred in denying profits as any part of the damages to be compensated, and that whether in cases of contract or of tort. So in a case of illegal capture, Mr. Justice Story rejected the item of profits on the voyage, and held this general language: "Independent, however, of all authority, I am satisfied upon principle that an allowance of damages upon the basis of a calculation of profits, is inadmissible. The rule would be in the highest degree unfavorable to the interests of the community. The subject would be involved in utter uncertainty. The calculation would proceed upon contingencies, and would require a knowledge of foreign markets to an exactness, in point of time and value, which would sometimes present embarrassing obstacles. Much would depend upon the length of the voyage, and the season of the arrival; much upon the vigilance and activity of the master, and much upon the momentary demand. After all, it would be a calculation upon conjectures, and not upon facts. Such a rule, therefore, has been rejected by courts

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\* *Flureau vs. Thornhill*, 2 W. Black., 1078.

† *Robinson vs. Harman*, 1 Exchequer Reports, 849; and see *Bitner vs. Brough*, 11 Penn. State R., 127.



of law in ordinary cases, and instead of deciding upon the gains or losses of parties in particular cases, a uniform interest has been applied as the measure of damages for the detention of property.”\*

So where a privateer had improperly detained a merchant vessel, and taken out her crew, in consequence of which she was lost—it was held by the Supreme Court of the United States that the owners of the privateer were liable only for the value of the vessel, the prime cost of the cargo, with all charges, and the premium of insurance.†

So in the same court, where a privateer had improperly boarded a vessel and taken away her papers, in consequence of which her voyage was broken up, it was held that the owners were not liable for the loss of profits on the intended voyage, nor for loss by deterioration of the cargo, which was not caused by the improper conduct of the captors, and it was said, “The prime cost or value of the property lost at the time of the loss, and in case of injury the diminution in value by reason of such injury, with interest upon such valuation, afford the true measure of damages. This rule may not seem a complete indemnity for all possible injuries, but it has certainly a general applicability to recommend it, and in almost all cases will give a fair and just recompense.”

The suit was against the owners, who were constructively liable, and it was admitted “that if it had been against the original wrongdoers, it might be proper to go yet farther, and visit upon them, in the shape of exemplary damages, the proper punishment which belongs to lawless misconduct.”‡

And in a similar case,§ the same principle was applied to a claim for damages for loss of a market.

So in Massachusetts, in an action of trespass against a deputy sheriff, for taking a schooner of the plaintiff under an attachment against a third party, there being some evidence that she was preparing for a voyage, and there being no malice on the part of the defendant, the jury were instructed to estimate her value at the time of taking, and “the additional damage

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\* The Schooner Lively, 1 Gallison, 314 and 325.

† The Anna Maria, 2 Wheat., 327. See, also, *Delcol vs. Arnold*, 3 Dall., 323.

‡ The Amiable Nancy, 3 Wheaton, 546, and 558.

§ La Amistad de Rues, 5 Wheat., 335.

sustained, if any." But it was held by the Supreme Court, that this would not justify the jury in assessing damages for the breaking up of the voyage.\*

So in a case of collision between vessels, it has been held that the owner of the injured vessel cannot recover for profits on the voyage broken up by the accident. In such a case the Supreme Court of the United States said: "It has been repeatedly decided in cases of insurance that the insured cannot recover for the loss of probable profits at the port of destination, and that the value of the goods at the place of shipment is the measure of compensation. There can be no good reason for establishing a different rule in cases of loss by collision. It is the actual damage sustained by the party *at the time and place of injury* that is the measure of damages."†

And the same general language, denying the admissibility of profits, was held by the Supreme Court of New York in an action brought for the price of a steamboat. The defendant showed that part of the machinery was unsound, and proved other imperfections by which considerable delay was caused, and claimed to deduct from the contract price of the boat, not only the sum necessary to remedy the actual defects, but also loss of profits upon the trips that might have been run during the time the vessel was delayed on account of the imperfections in the construction, having proved that each trip would bring one hundred dollars net profits. But it was disallowed, and the court, citing the language of Pothier, said: "In short, it will be seen that on the subject in question, our courts are more and more falling into the track of the civil law."‡

It has been heretofore stated that profits are by no means uniformly denied by the civil law, and for the reasons which I have already given, I very much doubt whether a resort to either the Civil or the French law will tend to facilitate our efforts to reduce our measure of damages to fixed rules, unless care is had to keep in mind the arbitrary discretion by which their sagacious principles are often controlled and broken down.

In a recent case in New York, where the defendant had contracted to furnish a steam engine for the plaintiffs, who were

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\* *Boyd vs. Brown*, 17 Pick., 548.

† *Smith vs. Condry*, 1 Howard, 28.

‡ *Blanchard vs. Ely*, 21 Wendell, 842.

makers of oil, and failed to comply with his contract, the plaintiffs sought to recover as consequential damages, the profits they could have made in the manufacture of oil, had the machinery been completed and put up within the time limited by the contract. But the claim was disallowed, and the recovery was limited to *the loss of the use of the plaintiffs' mill and other machinery*; the fuel consumed, the delay of the workmen employed for the purpose of carrying on the business, and the interest on the amount expended in purchasing stock for the mill.\*

So in an action brought on a covenant to keep a mill-dam in repair, it was held in Massachusetts that the plaintiff was entitled to recover the expense incurred in repairing the dam, but not loss of profits in business.†

It is clear, however, that future profits are sometimes allowed by our law, as will be seen hereafter, in regard to contracts to transport goods to a particular place;‡ as well as in actions brought on agreements for the sale and delivery of chattels. In the former case, the difference in value between the price at the point where the goods are, and the place where they were to be delivered, is taken as the measure of damages, which, in fact, amounts to an allowance of profits; and in the latter case, a similar result is had by the application of the rule which gives the vendee the benefit of the rise of the market price. And so, as we shall see hereafter, in an action by a principal against an agent for not shipping goods to a particular port, their value at that port has been held the measure of remuneration.§

Nor would it seem proper that the question should be governed by the analogies of the law of insurance. It is very reasonable that an insurance on cargo should not usurp the office of an insurance on profits. Under a policy on the plaintiff's interest in an inn and offices, he cannot, on the inn and offices being partly burnt, recover against the insurers for loss sustained by his hiring other premises while his own are being repaired, and by the refusal of persons to go to the inn while

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\* *Freeman vs. Clute*, 3 Barb. S. C. R., 424. But what is meant by "the loss of the use of the plaintiff's mill and other machinery?" Is it interest on the investment?

† *Thompson vs. Shattuck*, 2 Met., 615.

‡ *Brackett vs. McNair*, 14 J. R., 170.

§ *Bell vs. Cunningham*, 3 Peters, 69.

under repair, the insurers having reinstated the premises in proper time;\* the court saying, "if a party would recover such profits as these, he must insure them *qua* profits." But this does not touch the question we are now considering. The denial of profits by way of damages must evidently be taken with limitations. Chancellor Kent says, in his excellent Commentaries,\* that *speculative* profits are not allowed. It is difficult to say precisely what is meant by this phrase. The whole subject has been recently considered by the Supreme Court of New York, and an able attempt made to draw the true line between those profits which are to be allowed, and those which must be rejected.

In an action of covenant brought against the authorities of the city of Brooklyn, it appeared that in January, 1836, an agreement was entered into between the defendants and the plaintiffs, by which the latter agreed to furnish and deliver marble to build a City Hall in Brooklyn, from Kain & Morgan's quarry in Eastchester. The defendants were to pay \$271,600 in different sums, as the work proceeded. In March, 1836, the plaintiff entered into a covenant with Kain & Morgan, by which the latter were to furnish the marble in question, for which the plaintiffs were to pay them \$112,395 at the same times that the plaintiffs were to receive their payments from the defendants, and in the proportion which the above principal sums bore to each other.

The plaintiffs proved the delivery of the marble under their contract with the defendants till July, 1837, when the latter refused to receive any more marble, although the plaintiffs were ready to proceed. The entire quantity of marble necessary to fulfil the plaintiffs' contract was 88,819 feet. At the time the work was suspended, the plaintiffs had delivered 14,779 feet, for which the contract price was paid. The plaintiffs then had on hand, at Kain & Morgan's quarry, about 3,308 feet, ready for delivery; but this was not of much value for other buildings, and would probably not bring over two shillings per foot. It was proved that had the work progressed with ordinary diligence, it would have taken the plaintiffs about five years to

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\* In *Re Wright & Pole*, 1 Adol. & Ellis, 621.

† Vol. II. 5th edit., p. 480, in notes.

complete their contract ; and they then proved that the difference between the cost of the marble to them, and the price to be paid for it in 1836, was about 20 per cent. ; and that it fluctuated between that rate and 40 per cent. during the four successive years to 1840. That the ordinary profit calculated on by master stone cutters, was from 10 to 20 per cent. ; and that 15 per cent. was a fair living profit. All this evidence as to profits was objected to, but admitted by the Circuit Judge, (Kent,) under exceptions.

The defendants requested the circuit judge to instruct the jury that no damages "should be allowed on account of any supposed profits which the plaintiffs might have made out of the unfinished work, and that the damages allowed should be confined to the actual loss which the plaintiffs had sustained."

This the circuit judge refused to do, and he charged

"That the jury should allow the plaintiffs as much as the performance of the contract would have benefitted them—that the plaintiffs were entitled to recover for the unfinished marble not accepted, subject to a deduction of what should be deemed its fair market value ; that the jury should confine the damages to the loss of the plaintiffs, but that the benefit or profits which they would have received from the actual performance constituted such loss. That the defendants ought to be allowed what the jury should think just, as to interest on the outlays of the plaintiffs, also what the jury might think just for the risk of transportation, and the reasonable value of the marble unaccepted and unquarried. As to damages on the rough marble, to be delivered by Kain & Morgan, it appears by the contract, that the plaintiffs were obliged to purchase it from this quarry. The plaintiffs' contract with Kain & Morgan, if made in good faith, was entered into as a reasonable part of the performance by the plaintiffs of their own contract, and if the defendants by stopping the work, obliged the plaintiffs to break their contract with Kain & Morgan, then the damages on the latter ought to be allowed to the plaintiffs, who would be responsible to Kain & Morgan for the same. The jury are to give the difference between the contract price, and what it would cost Kain & Morgan to deliver the article, deducting the value of it to them, and making all proper allowances, as in the case of the principal contract. In fixing the damages to be allowed the plaintiffs, the jury are to take things as they were at the time the work was suspended, and not allow for any increased benefits they would have received from the subsequent fall of wages, or subsequent circumstances."

The jury found a verdict in favor of the plaintiffs for \$72,999. The defendants moved for a new trial, and Nelson, C. J., delivering the opinion of the Court, after noticing that

the damages for the marble on hand, ready to be delivered, were not made a matter of discussion on the argument, as to the claim for damages in respect to the remainder of the marble which the plaintiffs had agreed to furnish, but which they were prevented from furnishing by the suspension of the work in July, 1887, and as to the claim for profits, said :

"It is not to be denied, that there are profits or gains derivable from a contract, which are uniformly rejected as too contingent and speculative in their nature, and too dependent upon the fluctuation of markets and the chances of business to enter into a safe or reasonable estimate of damage. Thus, any supposed successful operation the party might have made, if he had not been prevented from realizing the proceeds of the contract, at the time stipulated, is a consideration not to be taken into the estimate. Besides the uncertain and contingent issue of such an operation, in itself considered, it has no legal or necessary connection with the stipulations between the parties, and cannot, therefore, be presumed to have entered into their consideration at the time of contracting. \* \* \* When the books and cases speak of the profits anticipated from a good bargain, as matters too remote and uncertain to be taken into the account in ascertaining the true measure of damages, they usually have reference to dependent and collateral engagements entered into on the faith, and in expectation of the performance of the principal contract."

"But profits or advantages which are the direct and immediate fruits of the contract entered into between the parties, stand upon a different footing. These are part and parcel of the contract itself—entering into and constituting a portion of its very elements, something stipulated for, the right to the enjoyment of which is just as clear and plain as to the fulfilment of any other stipulation. They are presumed to have been taken into consideration and deliberated upon, before the contract was made, and formed, perhaps, the only inducement to the arrangement."\* "If there was a market value of the article in this case, the question would be a simple one. As there is none, however, the parties will be obliged to go into an inquiry, as to the actual cost of furnishing the article at the place of delivery, and the court and jury should see that in estimating this amount, it be made on a substantial basis, and not left to rest on the loose and speculative opinions of witnesses." And Bronson, J., said, "as the marble had no market value, the question of profits involves an inquiry into the costs of the rough material in the quarry, and the expense of raising, delivering, and transporting it to the place of delivery."

And the learned Chief Justice fortified this allowance of profits, by reference to the civil law, and the analogies derived from the cases in our own law, which we shall hereafter have oc-

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\* See this language cited with approbation in *Lawrence vs. Wardwell*, 6 Barb. S. C. R., 428.

casion to consider, where upon non-performance of contracts for the sale and delivery of chattels, the market price, which of course includes profits, is made the measure of compensation.\*

So in a recent and similar case, the plaintiffs, contractors, were held entitled to recover from the defendants the profits on the construction of a section of an aqueduct, the work having been stopped by the defendants.† And I think it may well be doubted whether the language of some of the earlier American cases which I have cited has not pushed the rule beyond the true line.‡ The analogies of the law have certainly not been regarded. If on a contract to deliver goods at a distant point, their value at the place of delivery is the true criterion; if on a contract for the sale of chattels, the market price on the day fixed for delivery is the true measure of damage, it is difficult to assign a reason why the same rule should not be applied to the breaking up of a voyage actually commenced, nor why the victim of an illegal capture should be limited to the prime cost of his cargo.

We turn now to other cases connected with our subject.

The general principle, in regard to remoteness of damage, has been applied in Massachusetts to a case of surety. The defendant had executed an instrument by which he promised to hold the plaintiff harmless against any loss he might sustain by signing a certain bond for duties at the Passamaquoddy custom

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\* He further said, that where the contract, as in this case, is broken before the arrival of the time for full performance, and the opposite party elects to consider it in that light, the market price on the day of the breach, is to govern the assessment of damages—that they should be settled and ascertained according to the existing state of the market at the time the cause of action arose, and not at the time fixed for full performance. And the sub-contract with Kain and Morgan was laid wholly out of view, as one in or over which the defendants had neither participation nor control, and which they should not be compelled to assume, if improvidently entered into, and on this latter point a new trial was ordered. We shall have occasion to consider these parts of this decision when we come to the subject of continuing agreements and Evidence with reference to damages. Mr. Justice Beardsley dissented, holding that the fluctuations in price during the five years which the contract was to run, should be taken into account. He concurred as to the allowance of profits, and as to the disregard of the sub-contract of Kain and Morgan. *Masterton vs. Mayor of Brooklyn*, 7 Hill, 62. See, also, *N. Y. & H. R. R. Co. vs. Story*, 6 Barb. S. C. R., 419, and *Seaton vs. Second Municipality*, 8 La. Ann. R., 45, where the authority of this decision is recognized.

† *Clark vs. the Mayor*, 3 Barb. S. C. R., 238.

‡ I am gratified to find this remark cited with approbation by the Supreme Court of Alabama, per Chilton, J., in *Donnell vs. Jones*, 17 Ala., 689.

house. The plaintiff showed that in 1814 the British captured Eastport, got possession of the custom house and bond in question, that they issued a writ against the plaintiff as obligor, that the plaintiff was obliged to fly to avoid arrest, and that his business was greatly injured thereby. But it was held that he could claim no remuneration for any such injury, and Parker, C. J., delivering the opinion of the Court, said :

"The common construction of such a contract is, that if the surety is obliged to pay the bond by suit, or otherwise, the principal shall repay him the sum he has been obliged to advance, together with all such reasonable expenses as he may have been obliged to incur, and which may be considered as the necessary consequence of the neglect of the principal to discharge his own debt. But extraordinary expenses which might have been avoided by payment of the money, or remote or unexpected consequences are never considered as coming within the contract. Thus, if a surety, by reason of being obliged to pay money for his principal, becomes embarrassed in business, and is finally obliged to abandon it, it is not expected that the principal will be held to indemnify him for this consequential misfortune. It is not the natural and necessary effect of his becoming a surety, but is occasioned by his undertaking to do what he was not in a condition to perform. So flight to avoid payment of his debt, is an accident wholly unforeseen, and its consequences cannot be considered as provided for."\*

So in New York, the plaintiff sued the defendant on a contract, by which the defendant, in consideration of \$5 paid him, agreed to take a note executed by the plaintiff and a surety, payable the first of May, and to forbear prosecution of the note for nine months ; and it was alleged that the defendant did not forbear, but sued on the note, by which the plaintiff lost \$500. The plaintiff offered to prove, to enhance the damages, that when he was sued he was engaged in his harvest, and that for the purpose of raising money to satisfy the demand, he was obliged to quit his work, and thresh his grain, and that he was put to great trouble in raising the money. But on certiorari to the Supreme Court, Woodworth, J., said, "It appears to me that this could not form a ground of damages, although the plaintiff might have suffered inconvenience and loss by the failure to fulfil the contract. Such remote consequences cannot be taken into consideration in estimating the damages ;" which was

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\* *Hayden vs. Cabot*, 17 Mass., 169. See, also, *Bishop vs. Williamson*, 2 Fairfield, 504.



qualified by this remark: "besides, there does not appear any necessity that the plaintiff, at the moment the writ was served, should quit his harvest and make sacrifices to raise the money."\*

So, again, where, in a lease of a dairy farm for five years, the lessor agreed to put the barns on the premises in a good state of repair, but neglected to do so, it was held that the lessee could recover the amount it would cost to put the barns in repair, but not the damage sustained by injuries to the cows and young cattle, the increase of food and the decrease of produce resulting from the state of the barns, these damages being altogether too remote and contingent.†

In a case in New York, where the plaintiff sued the defendant for the breach of an implied warranty in the sale of a horse which had been recovered from him at the suit of a third party—it was held by the Supreme Court that the measure of damages was the price paid by the purchaser, with interest, and the costs recovered against him; and that the costs incurred by him in the defence of the action brought by the real owner were not allowable.‡

So, again, where the defendant sold the plaintiff certain cloths for the Mexican market, accompanied by an invoice specifying the contents of the bales, and warranted correct, but in which the number of yards was much over-stated—the goods, on being forwarded to Mexico by the plaintiff, were entered at the custom-house before the mistake in the invoice was discovered, and the duties paid upon the erroneous amount; the parties settled the difference between them amicably, so far as the price of the goods was concerned, and the action was brought to recover the excess of Mexican duties paid by the plaintiff, together with certain commissions in New York, in consequence of the erroneous valuation made by the defendants in their invoice. But the suit was successfully resisted, and the claim disallowed.§

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\* *Deyo vs. Waggoner*, 19 J. R., 241.

† *Dorwin vs. Potter*, 5 Denio, 806.

‡ *Armstrong vs. Percy*, 5 Wend., 585.

§ *Hargous vs. Abon et al.*, 5 Hill, 478. See this case again, 8 Denio, 406. There is a number of analogous cases governed by the maxim *non remota sed proxima causa spectatur*. Broom's Legal Maxims, p. 105.

In a recent case in England, where a prize had been offered for the best plan and model of a machine, and plans and models were to be sent by a certain day, the plaintiff sent a plan and model accordingly by a railway; but through the negligence of their agents, it did not arrive at its destination till after the time appointed; it was contended that the proper measure of damages was the value of the labor and materials expended on the plan and model, and that the chance of obtaining the prize was too remote to be estimated.\*

We turn now to actions of tort. In regard to cases of deliberate or malicious wrong, we have already seen that the law applies very liberal relief. And in cases of reckless or mischievous acts injurious to others, even where exemplary damages are not claimed, the party in the wrong is often made answerable for consequences very remote from the original act. So in the famous squib case, the first thrower of the combustible was held responsible, though it had passed through the hands of two other parties.† So where the defendant foolishly went up in a balloon, which descended into the plaintiff's garden, and attracted a crowd, who trod down the plaintiff's vegetables and flowers, the original wrongdoer was held answerable for the injury done by the crowd as well as by himself.‡ So where the defendant having quarrelled with a boy, pursued him with a pickaxe, and followed him into the plaintiff's store, where, in his effort at flight, he committed unintentional damage, the defendant was held responsible for the injury thus done.§

So in an action of trespass in Massachusetts, for breaking down and destroying part of a mill-dam, damages were assessed for the cost of repairing the dam, and also for interruption to the use of the mill, or diminution of profits occasioned by the water flowing through the break in the dam, and by that means falling too low for the working of the mill: it was objected that damages for the latter cause could not be recovered

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\* *Watson vs. Ambergate N. & B. Railway*, 15 Jur., 448.

† *Scott vs. Shepherd*, 2 W. Black., 892.

‡ *Guille vs. Swan*, 19 J. R., 881.

§ *Vandenburgh vs. Truax*, 4 Denio, 464. But the defendant, liable in an action of false imprisonment for an unfounded arrest, is not responsible for further damages resulting from the plaintiff's remand by a magistrate, that being a judicial act. Look *vs. Ashton*, 12 Q. B. R., 871.

in this action; but the Supreme Court said, "The interruption to the use of the mill and the diminution of the plaintiffs' profits on that account, were alleged in the declaration and proved at the trial, and we think this was right. The plaintiffs are entitled to recover for all the damages they suffered by reason of the trespass."\*

And in a case at nisi prius,† Lord Kenyon held that an action lay for firing on negroes on the coast of Africa, and thereby deterring them from trading with the plaintiff, so that the plaintiff lost their trade.‡ "I do not think," says an eminent English Judge, in a recent case, "that the jury is bound to weigh in golden scales how much injury a party has sustained by a trespass."§

So where the defendant's servant had left his horse and cart in the public street, where children might be playing. The plaintiff, who was a child between six and seven years of age, and several other children, played about the cart, and the plaintiff got into it, and another boy led the horse on, and as the plaintiff was getting out, he fell, and the cart-wheel ran over his leg, and broke it. It was contended that the mischief was not produced by the unlawful act of the servant alone, but by that combined with two other active causes, namely, the advance of the horse caused by the other boy, and the plaintiff's improper conduct and trespass in mounting the cart. Lord Denmon, C. J., said: "Certainly, the child was a coöperating cause of his own misfortune, by doing an unlawful act; and the question arises, whether that fact alone must deprive him of his remedy." \* \* "The question remains, Can the plaintiff then, consistently with the authorities, maintain his action, having been at least equally in fault? The answer is, that supposing that fact ascertained by the jury, but to this extent, that he

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\* *White vs. Mosely*, 8 Pick., 356.

† *Tarleton vs. McGawley*, Peake, N. P. Cases, 205.

‡ The case appears to come under the head of profits; whatever was lost must have been the profits of the trade. I may here remark that the doctrine of the denial of profits that might have been made in a business, was again affirmed in *Giles vs. O'Toole*, 4 Barb. S. C. R., 261; while admitting that the plaintiff was entitled to the value of a bargain actually made. It was an action by lessee of a store against lessor, for a refusal to give possession of the demised property. The plaintiff was allowed his expenses in preparing to remove, but not the profits which he might have made in business on the premises.

§ *Gillard vs. Brittan*, 8 Mees. & Wels., 575.

merely indulged the natural instinct of a child, in amusing himself with the empty cart and deserted horse, then we think that the defendant cannot be permitted to avail himself of that fact. The most blamable carelessness of his servant having tempted the child, he ought not to reproach the child with yielding to the temptation. He has been the real and only cause of the mishap." And the verdict for the plaintiff was sustained.\*

So again, where the defendant had taken a horse and wagon belonging to the plaintiffs. They spent four days in searching for the horse and wagon, and incurred other expenses in the search. A verdict was given for the time spent, and expenses incurred in the pursuit. It was objected that the damages were too remote; but the verdict was sustained by the Supreme Court, and considerable stress was laid on the circumstance, that the damages were occasioned by the wrongful act of the plaintiff.†

In these cases the decisions appear to follow the analogy of the civil law, in which, as we have seen, the party suffering from *dolus* or *culpa lata*, was held entitled to more liberal remuneration than he who was injured by *culpa levis* only. "The better opinion is," says one of the German commentators on the Roman law, "that in cases where the injury is caused by fraud, gross negligence, or malice, (*contumacia*) the plaintiff is entitled to reparation, as well for the profit lost, (*lucrum cessans*) as the actual injury done, (*damnum emergens*;) but that, on the contrary, where the defendant's illegal act does not rise beyond the grade of ordinary fault, (*culpa*) he is only responsible for actual loss."‡ In other words, where the act complained of is one greatly to be censured of evil example, and likely, from its very nature, to be fraught with injurious results, although not of so flagrant a character as to warrant vindictive damages, the law will not nicely attempt to limit the amount of reparation, but will pursue the wrongdoer with severity, and extend the line of relief, so as to embrace all the consequences of his conduct, although somewhat remote from the original transaction.

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\* Lynch *vs.* Nurdin, 1 Queen's B. Rep., 29, (41 Eng. C. L. Rep., 422.)

† Bennett *vs.* Lockwood, 20 Wend., 228.

‡ Haenel, von Schadenersatze. The original citation will be found *supra*, at p. 24.

But, as a general rule it may be said that in cases of tort without aggravation, where the conduct of the defendant can not be considered so morally wrong, or grossly negligent, as to give a right to exemplary or vindictive damages, the extent of remuneration is restricted according to the principles which we have been considering, to the immediate consequence of the illegal act. "The rule of law is well established, that in cases of torts it is necessary for the party complaining to show that the particular damages in respect to which he proceeds, are the legal and natural consequences of the wrongful act imputed to the defendant."\* This general principle has been recognized in a multitude of cases. Thus, where an action was brought by the proprietor of a theatre against the defendant for having written a libel upon one of the plaintiff's singers, by which she was deterred from appearing, and alleging that his profits were consequently lost, Lord Kenyon held the injury much too remote to be the foundation of an action, saying: "If an injury has been suffered, it was occasioned entirely by the vain fears or caprice of the actress.†

So where in an action for an assault, the plaintiff sought to prove as special damages, that by reason of the assault he was driven from Alicant, in Spain, where he had previously done business as a merchant, it was held by far too remote.‡

So in case for seduction. The plaintiff's daughter was seduced and the connection broken off; in consequence of the distress of mind, occasioned by the desertion, the young woman became ill, and the loss of service resulted from the illness. The Lord Chief Baron of the Exchequer held at the trial that the damage was too remote, saying that it was caused by the abandonment, not by the seduction.§

So in Alabama, in case for malicious prosecution, whereby the plaintiffs were driven to an assignment, the loss in the sale of the goods made under the assignment is not a proximate or natural consequence of the malicious prosecution.¶

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\* *Clark vs. Brown*, 18 Wendell, 218—229.

† *Astley vs. Harrison*, Peake, N. P. Cases, 194; S. C., 1 Esp., 48.

‡ *Moore vs. Adams*, 2 Chitty's R., 198.

§ *Boyle vs. Brandon*, 18 M. & W., 728. On argument this was thought doubtful, but the point was not decided.

¶ *Donnell vs. Jones*, 18 Ala., 490.

So in New York, in an action on the case against a railroad company, for injuries resulting from a collision, the plaintiff proved that his leg was broken, and that the oblique character of the fracture rendered it very probable that a second fracture would take place; but this the Supreme Court held too remote. "The present and probable future condition of the limb were proper matters for inquiry, but the consequences of a hypothetical second fracture were obviously beyond the range of it, and calculated to draw the minds of the jury into fanciful conjectures."\*

So in Massachusetts, where a contractor for the support of town poor, at a fixed sum per annum, was bound to support them in sickness and health, at his own risk, and the defendant committed an assault and battery on one of the paupers, by means of which he was hurt, and the plaintiff put to increased expense for his support, the damage was held too remote and indirect to sustain an action.†

So in slander, in an action for slanderous words not actionable in themselves, the plaintiff cannot prove that he sustained special damage by means of the repetition by a third person of the words uttered by the defendant.‡ So, also, in England, where in slander special damage was alleged, from words spoken by the defendant, held that this allegation could not be supported by proof that the defendant had spoken the words to a third party, and that damage ensued in consequence of the third party repeating them, without authority, as the words of the defendant. And Tindal, C. J., said: "No effect whatever followed the first speaking of the words. Every man must be taken to be answerable for the necessary consequence of his own wrongful act. But such a spontaneous and unauthorized communication cannot be considered as the necessary consequence of the uttering of the words."§

Where the defendants, after a will had been made and executed devising certain real estate to the plaintiff, conspired with

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\* *Lincoln vs. Saratoga & S. R. R. Co.*, 28 Wendell, 425.

† *Anthony vs. Slaid*, 11 Met., 290.

‡ *Stevens vs. Hartwell*, 11 Met., p. 542.

§ *Ward vs. Weeks*, 7 Bingham, 211. According to Lord Northampton's case, 12 Coke, 134, the repetition of slander might be justified by giving the original author of the slander; but this has long since been overruled. *McPherson vs. Daniels*, 10 B. & Cres., 268.

each other to induce the testator to revoke it, and effected their object by means of false and fraudulent representations; held that the plaintiff could not maintain an action, as the damage which he sustained was merely by reason of being deprived of an expected gratuity, and not by an interference with any of his rights. "The plaintiff had no interest in the property of which he alleges that he has been deprived by the fraudulent interference of the defendant, beyond a mere naked possibility, an interest altogether too shadowy and evanescent to be dealt with by courts of law."\*

In an action for false imprisonment on board a ship, the plaintiff cannot recover as special damage, the expense he incurred in leaving the ship and taking his passage on board another, unless the imprisonment continued to the moment of his transshipment, and was the immediate cause thereof,† as if he acted to save his life, or from a reasonable regard to his safety.

The same principle has also been applied to the construction of statutes.

An action was brought in the King's Bench, on the stat. 1, Geo. I., st. 2, c. 5, § 6, against the hundred for reparation in damages on account of rioters having pulled down in part the plaintiff's dwelling-house, and there was a second count for beginning to pull down an out-house. The plaintiff was a baker. It was proved that the mob compelled the plaintiff to sell a quantity of flour at a price much below its value; that they then began to break the windows of the bake-house, and of his dwelling-house. Besides this, they burst open the lock of a warehouse, belonging to the plaintiff on the other side of the street, and threw some flour into the street. It was held that the damage done the warehouse, was an act not consequential to the other—and that the flour which the mob compelled the plaintiff to sell, was not a damage recoverable against the hundred.‡

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\* *Hutchins vs. Hutchins*, 7 Hill, 104.

† *Boyce vs. Bayliffe*, 1 Campb., 58; where, to show how far attempts of the kind might be carried if the necessary connection were not insisted on, Lord Ellenborough alluded to a case which used to be cited by Lord Alvanley, where the plaintiff complained of false imprisonment *per quod*, being confined on shore, he lost a lieutenancy.

‡ *Burrows vs. Wright*, 1 East, 615.

And the same point was held in another action brought against the hundred, as to flour taken away or stolen by a mob.\*

So in an action in Massachusetts, on what is called the mill act, to recover damage for the flowage of land, the plaintiff offered to prove that the flowed land, when the water was drawn off, emitted offensive and noxious smells, and claimed damages therefor. But it was rejected; the court saying that the law did not justify an allowance for remote, possible or speculative damages.†

So where, as in Massachusetts, it is declared by statute that "any owner or keeper of a dog, shall forfeit to any person injured by such dog, *double the damage sustained by him*;" it is held, in expounding that statute, that when the plaintiff brings such action for the injury done to a minor child, he is entitled to recover for the loss of his services, and the expense of his cure.‡

But in Connecticut, towns liable to pay "just damages" for defects in bridges or roads, are not liable for consequential damages, such as the loss of service, expense of nursing resulting to a person for injuries to his wife and daughter.§ To this branch of our subject we shall again advert when we come to the subject of statutes.

Having thus far illustrated the application of the general rules which prohibit remote or consequential damages, by an examination of those cases where they have been denied, we now come to consider those instances in which a wider rule of construction has been adopted. They will be found to be few, and may, I think, generally be said to belong to the class of cases which the civil law ranks under *dolus*, or *culpa lata*. This distinction has even been intimated in cases of contract.

Perhaps the strongest case is one in the English Common Pleas, where an action was brought on the warranty of a chain cable, that it should last two years, as a substitute for a rope cable of sixteen inches; and it was alleged, that within the two years the cable broke, and that thereby an anchor, to which the

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\* Greasley *vs.* Higginbottom, 1 East, 686.

† Eames *vs.* N. England Worsted Co., 11 Met., 570.

‡ McCarthy *vs.* Guild, 12 Met., 291.

§ Chidsey *vs.* Canton, 17 Conn., 475.



cable was affixed, was lost. A verdict being found for the value of cable and anchor, a motion was made for a new trial, and it was insisted that the principle contended for by the plaintiffs would render the defendants liable for the loss of the ship, if on the breaking of the cable that event had happened. But the loss was held not too remote, and Dallas, C. J., said: "The defendants warrant the cable sufficient to hold the anchor, and it is proved not to be sufficient. The holding of the anchor by the cable is the very essence of their warranty;" and a new trial was refused.\*

And where an agreement had been made to let certain premises as a tavern stand, and the plaintiff had removed his family to take possession, which was refused, it was held that the plaintiff was entitled to recover, not only the value of the lease, but also his expenses in removing his family and furniture, and this without any allegation of special damage in the declaration.†

A case very analogous to this was decided in Massachusetts, where a defendant had engaged the plaintiff to remove to Indiana, to carry on business there, and failed to furnish the stock necessary for so doing; the court allowed the plaintiff as damages, compensation for the loss of his time in removing to Indiana and back again to his original domicile.‡

In an early case, in which the plaintiff declared for breach of an agreement to let the plaintiff have the use of certain mills for six months, in consideration of £10, it appeared that the mills were worth but £20 per annum, and yet damages were given to £500, by reason of the stock laid in by the plaintiff; "and *per curiam*, the jury may well find such damages, for they are not only bound to give the £10, but also all the special damages."§

In a recent case in New York, the Supreme Court of that

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\* *Borradaile vs. Brunton*, 8 Taunton, 585. S. C., 2 J. B. Moore, 202. Either the case is ill reported, or the learned Chief Justice gave the warranty a very broad construction; nothing is said in Taunton about the "cable being warranted sufficient to hold the anchor."

† *Driggs vs. Dwight*, 17 Wend., 71; *Lawrence vs. Wardwell*, 6 Barb. S. C. R., 423; see also, *Giles vs. O'Toole*, 4 Barb. S. C. R., 261; and see *Ward vs. Smith*, 11 Price, 19.

‡ *Johnson vs. Arnold*, 2 Cush., 46.

§ *Nurse vs. Barnes*, T. Raym. R., 77.

State, commenting on this case, said : " Very likely it appeared that the breach of contract was committed to favor some particular interest of the defendant, or his friend, though the case mentions a simple refusal to perform ;"\* but perhaps it may rather be brought within the rule of the French law, both parties knowing the object to which the mills were to be applied, and the loss of the plaintiff's stock being considered as contemplated by them.

In another recent case in New York, the plaintiff sued the defendant in covenant for not maintaining a ferry in good order, according to the agreement contained in a lease made to him by the plaintiff. The plaintiff proved, that, instead of keeping the ferry in good order, the defendant had discontinued it, and transferred it to another wharf of his own, by means of which a tavern stand of the plaintiff at the original ferry, which he had previously let at \$300, was injured in its business, so that he could not let it at all. The judge at the trial ruled that the plaintiff was entitled to recover his *actual damages* sustained in the loss of rent, and the jury found a verdict for \$225. A new trial was denied, the court holding " that the damages proved were a legitimate claim, and the legal and natural consequences of the breach of the covenant."†

In the case above cited,‡ the Supreme Court of New York, commenting on this last case, said : " It must have been regarded as a fraudulent breach of covenant to keep a ferry in repair, which materially benefitted the plaintiff's tavern. The defendant left it unrepared, in order to favor his own ferry ; and therefore damages were allowed, for loss of custom at the plaintiff's inn."

The ground taken in explanation of these cases, by the learned Supreme Court of New York, cannot, I think, with great deference, be maintained. It supposes that the remote or consequential damages were given on the ground that the contracts were fraudulently violated. This assumes, that in actions on contracts, *ex contractu*, the damages will vary, according to the intention of the party in default, and that evidence may be

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\* *Blanchard vs. Ely*, 21 Wend., 842.

† *Dewint vs. Wiltse*, 9 Wend., 325.

‡ *Blanchard vs. Ely*, 21 Wend., 842.

received, and damages will be awarded in regard to the motives of the defendant. When we come to consider the general rules which control the measure of damages in actions on contract,\* I believe I shall be able to show that this suggestion is untenable, and that if these cases are to be considered as well decided, some other explanation of them must be given.

We have already seen,† that in cases of illegal or mischievous conduct, the disposition of the courts is to make the party in the wrong liable for injurious consequences flowing from the illegal act, although they be very remote.‡

So where the defendant had not repaired his fence, by reason of which the plaintiff's horses escaped into the defendant's close, and were there killed by the falling of a hay-stack; the court considering that such damage was not too remote.§

So where the defendant drove against the plaintiff's carriage, and by the shock the plaintiff's friend was thrown off the seat on to the dashing-board, and the dashing-board falling on the horse, he kicked and broke it; it was held that all the damage so sustained was recoverable in trespass.¶

So where the injury complained of was, that the defendants had invited the plaintiff's servants to dinner, and induced them to leave him; the injurious consequence complained of was, that the plaintiff had lost the profits of the sales of pianos for two years; and this was held not to be too remote, although the servants were not hired by the plaintiff for any definite period, but worked by the piece. Mr. J. Richardson remarks: "The measure of damages he is entitled to receive from the defendants is not necessarily to be confined to those servants he might have in his employ at the time they were so enticed, or for the part of the day on which they absented themselves from his service, but he is entitled to recover damages for the loss he sustained by their leaving him at that critical period."¶¶

So again, where the defendant undertook to carry a quantity of the plaintiff's lime in his barge from Medway to London, and

\* Post, Chap. VII.

† Supra, pp. 79, 80.

‡ Supra, p. 80, 81; Scott *vs.* Shepherd, 2 W. Black, 892; Vandeburgh *vs.* Truax, 4 Denio, 465.

§ Powell *vs.* Salisbury, 2 Young and Jerv., 891.

¶ Gilbertson *vs.* Richardson, 5 Man. Gr. & S., 502.

¶¶ Guntor *vs.* Astor et al., 4 Moore's Rep., 12, (16 Eng. Com. Law Rep., 857.)

in going to London, deviated from the usual course, and during the deviation, a tempest wet the lime, whereby it set fire to the barge, and the whole was destroyed ; it was held that the cause of the plaintiff's loss, to wit, the deviation from the usual course, was sufficiently proximate to entitle the plaintiff to recover, although the immediate cause of the loss was the wetting of the lime by the tempest. In that case, the wrongful act was the deviation from the usual course, and the injurious consequence was the loss of the lime, by first getting wet in the tempest, and secondly, from its natural quality, setting fire to the barge ; and it was held not to be too remote, although it was contended that there was no natural connection between the wrongful act, to wit, the deviation, and the loss of the lime, as the same accident might have happened in the usual course ; and Tindal, C. J., said : " No wrongdoer can be allowed to apportion or qualify his own wrong ; as a loss has actually happened whilst his wrongful act was in operation and force, and which is attributable to his wrongful act, he cannot set up as an answer to the action, the bare possibility of a loss, if his wrongful act had never been done."\*

So in Massachusetts, it was held, in an action for trespass\* for digging into a river bank near a dam, that the plaintiff might recover for the injury consequential on the digging, which consisted of the damage done by a flood that occurred three weeks after, and swept away several acres of land, and a cider mill ; the court saying that the plaintiff was entitled to recover in this action all the damage of which the injurious act was the efficient cause, and that it was not necessary to put him to an action on the case for the consequential injury—no malice was suggested.†

In New York, in case for fraud, where an agent, authorized to sell a flock of sheep, sold a portion of them with knowledge that they were diseased, and the diseased sheep were mixed with another flock ; it was held that the claim of the purchaser against the principal was not limited to the loss of the sheep purchased, but extended to that of the others to which the distemper was communicated ; and the court said, " this damage

\* Davis *vs.* Garrett, 6 Bing. Rep., 716, (19 Eng. C. L. Rep., 212.)

† Dickinson *vs.* Boyle, 17 Pick., 78. The only objection taken by the defendant seems to have been, that the action should have been case, and not trespass.

was the natural consequence of the fraudulent act of the defendant's agent."\* This case we have seen similarly decided by Pothier.

Where the plaintiff sued the defendant in case for the loss of service of a servant, resulting from the accidental collision with the defendant, it was held in England† that the damage was not too remote, though *case*, and not *trespass*, would have been the proper remedy, if the servant had been plaintiff.‡

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\* *Jeffreys vs. Bigelow*, 18 Wend., 518.

† *Martinez vs. Guerber*, 3 Scott New Rep., 386.

‡ I owe to the courtesy of the Hon. James Gregg, of South Carolina, the report of the following case, *Berkley vs. Harrison*, decided in May, 1847, by the Court of Appeals in that State. See *South Carolina Temperance Advocate*, June 10, 1847. The paper also contains an able argument by Mr. Gregg, as Counsel for the plaintiff, where the cases are well collected. It was an action of trespass on the case, in which the plaintiff sought to recover damages, for that the defendant being a shopkeeper, in violation of the statute on the subject, and to the wrong of the Plaintiff, sold and delivered ardent spirits to his slave, by means whereof the said slave became intoxicated, lay out all night, and died. The plaintiff claimed only compensation for his actual loss, and the jury were instructed to regard the defendant as one who, with no particular evil purpose or ill will towards master or slave, had violated the law only for his own gain. They found for plaintiff, \$650, the value of the slave.

On appeal, it was said: It would be vain to attempt to lay down any general rules by which consequences that shall be answered for, and those which are too remote for consideration, may be always distinguished; but, according to the general course of decision on this point, it would seem that where, as in this case, the mischievous purpose is manifest, or could be foreseen by ordinary prudence, there the wrong consists in ministering to that purpose, and the natural consequences of that purpose are the legal consequences of the injurious act. The drinking and intoxication of the slave, were the natural and probable consequences of selling liquor to him. The lying out all night was the immediate effect of the intoxication, and the two produced death. Thus, without any unconnected influence to be perceived, the death has come from the intoxication, which the defendant's act occasioned. The proximity in order of events, and intimacy of relation as cause and effect between the injurious act and the damage, are sufficiently great to free the verdict from the objection that the damages were too remote.

In *Wright vs. Gray*, 2 Bay Rep., 464; Gray, being concerned in a horse-race, had without Wright's permission, persuaded his negro boy to ride his horse, which, in the race, threw the boy against a tree and killed him. The jury having found a verdict for the plaintiff for the value of the boy, a motion was made for a new trial, which the judges unanimously refused, upon the ground, as set forth in the report, "that a man who officiously presumes to interfere with, or make use of, the property of another, without his permission, is liable for all the consequences of such interference, whether he intended any injury to the owner or not."

In *McDaniel vs. Emanuel*, 2 Rich. Rep., 455; the plaintiff's negro Jack, had been employed by the defendant's agent on his boat, without the consent of his owner, according to the weight of the evidence, and fell overboard and was drowned, though there was some evidence to show that Jack was employed with the consent of the owner, and there was also some evidence to show that Jack was drowned by the negligence of the defendant's agent, the captain of the boat. His Honor, Judge Butler,

Where the defendant had sold to the plaintiff's father a gun, for the use of himself and his son, falsely and fraudulently representing the gun to be made by a particular maker, and to be well made, when, in truth, it was not made by the gunsmith in question, nor well made; and the gun exploded in the hands of the plaintiff, and maimed him; it was held that the damage was not too remote. "We think," said Parke, B., "that as there is fraud and damage, and the result of that fraud not from an act remote and consequential, but one contemplated by the defendant at the time as one of its results, the party guilty of the fraud is responsible to the party injured."\*

So where the defendant being about to sell a public house, falsely represented to a third party who had agreed to purchase it, that the receipts were a certain sum per month, these representations being, to the knowledge of the defendant, communicated to the plaintiff, who therefore became the purchaser; held that an action lay against the defendant at his suit.†

If the defendant state positively to the commander of a press-gang, that the plaintiff is liable to the impress service,

who tried the case, states, in his report, as his instruction to the jury: "Taking this view of the facts, (that is, that Jack was employed without the consent of his owner,) I was of opinion that the Company was liable for the loss of Jack, even if it should appear that his death resulted from one of the ordinary perils incident to the navigation of the boat, and without any actual fault on the part of the captain at the time the catastrophe occurred, upon the ground that Jack had been used, by the agent of the Company, in a way different from the understanding of Waterman, and in opposition to the instructions of his master," (that is, without the consent of his master.)

In *Duncan vs. the Railroad Company*, 2 Rich. Rep., 618, the plaintiff's negro, Wesley, was carried on the railroad car without the consent of his owner, and in jumping off was killed. His Honor, Judge O'Neill, in delivering the opinion of the Court, says: "In such a case, (that is, carrying the slave on the railroad car without the consent of his owner,) it is in vain to say that the slave was a moral agent, capable of wrong as well as of right action, and that he killed himself by jumping off when he ought not." And he referred with approbation to *Strawbridge vs. Turner*, 9 Louis. Rep., 213, where the captain of a steamboat took into service the slave of the plaintiff, and without his consent, and the slave having been drowned by jumping or falling overboard, the defendant was held liable, upon the ground of the illegal employment. So, if a slave should, without his owner's permission, get on the railroad car at Columbia, to go down to his plantation, a dozen miles below, and should be killed in jumping off opposite the plantation, the company would be held liable, upon the same ground, that they had illegally interfered with the slave without the consent of the owner.

\* *Langridge vs. Levy*, 2 Mees. & Wels., 519; affirmed in the Exchequer Chamber, 4 Mees. & Wels., 387.

† *Pilmore vs. Hood*, 5 Bing. N. C., 97. See, also, *Taylor vs. Ashton*, 11 M. & Wels., 400.

where in truth he is not so, and the plaintiff in consequence of this information is impressed, the defendant is liable to an action of trespass at the plaintiff's suit, the impressment being the consequence of the false statement.\*

In New York, in an action on the case for negligently running over and killing the plaintiff's son, the plaintiff was allowed to recover for the deprivation of the society of the wife, and the expense resulting from her illness consequent on the death of the child, these damages being specially laid in the declaration, and clearly proved to have been the consequence of the act complained of.†

We must take notice that there are cases where evidence of loss somewhat remote has been received, not on the ground of its being a measure of damages, but as an ingredient in the cause, proper to go with the other facts to the jury.‡ So in a case of libel against the editor of the Times, for the insertion in that paper of a statement that the vessel, an East Indiaman, of which the plaintiff was owner and master, was not seaworthy, and that Jews had bought her to take out convicts. On the trial, the plaintiff was allowed to prove the average profits to the captain on an East India voyage, and the jury were instructed that, with a view to estimate the damage, they might look to the nature of his business, and his general rate of profit; and on a motion for a new trial, this was held right. But the evidence of profits was not regarded properly as a *measure of damage*. Maule, J., said: "The evidence was admitted only that the jury might know what sort of business the plaintiff carried on;" and Coltman, J., said: "With respect to the damages, the jury must have some mode of estimating them, and they would not be in a condition to do so, unless they knew something of the plaintiff's business, and the general return from his voyages." The evidence was admitted, not as a measure of damages, but to serve as a guide for the exercise of that discretion which, to a certain extent, is always vested in the jury.

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\* *Flewster vs. Royle*, 1 Camp., 187.

† *Ford vs. Monroe*, 20 Wend., 210. But as to the damages for the death of the child, see the law of this case denied in *Carey and wife vs. Berkshire R. R. Co.*, 1 Cushing, 475; and *Skinner vs. Housatonic R. C.*, *ibid.*

‡ *Ingram vs. Lawson*, 6 Bing. N. C., 212.

So in Alabama, in an action for malicious prosecution, the plaintiffs claimed for loss of profits, and the court admitted evidence on that point, saying, however, "We would by no means say that the jury should make the supposed profits, which the plaintiffs had lost, the *measure of damages*. All we design to affirm is, that proof tending to establish such loss as a consequence of the suit, may properly go before the jury to serve as some guide for them in the exercise of their discretion in estimating the loss."\* It will be noticed that these cases are in tort. And here the evidence appears to be often necessary.

Where an action was brought for breach of an agreement to form a partnership, and it was proved that the plaintiff had given up an East India voyage, as was well known to the defendant, he was allowed to shew the value of the voyage, not as special damage, but as an ingredient for estimating the value which each of the parties set on the contract in dispute.†

There is great difficulty, however, in principle, in admitting evidence of this kind in cases of contract. It is a practical abandonment of those safe rules which go to exclude remote damage. If evidence is admitted, and a fact undisputed, the jury should be controlled by it.

The same principle which refuses to take into consideration any but the direct consequences of the illegal act, is applied to limit the damages where the plaintiff, by using reasonable precautions, could have reduced them.

"If," said Lord Chief Justice Abbott at *Nisi Prius*, "you charge anybody with a loss arising from mistake, you should show that no due diligence could have been used by you which might have prevented that loss."‡ "In an action for an injury occasioned by the negligence of another," says Mr. Starkie, "it is a good defence to show that the injury so far arose from the negligence of the plaintiff himself, that he might by ordinary care and caution have avoided the injury."§

So in case, though the party charged be in fault; yet, if the proximate and immediate cause of the accident be the unskill-

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\* *Donnell vs. Jones*, 17 Ala., 689.

† *McNeil vs. Reed*, 9 Bing., 68.

‡ *Hordern vs. Dalton*, 1 Car. & Payne, p. 181.

§ *Starkie on Evidence*, Vol. 2, p. 741, Tit. Nuisance.



fulness of the plaintiff, there is no relief. Thus, where the defendant illegally placed a heap of lime rubbish in the highway, the dust of which frightened the plaintiff's horse; the animal ran, and in running approached a wagon. The plaintiff, who was driving, endeavored to divert him from the direction of the wagon, but did it so unskillfully that he ran over another heap of rubbish, which upset the plaintiff's vehicle, and did other damage. This was held by the English Common Pleas, too remote, it being considered that the proximate and immediate cause of the accident was the unskillfulness of the driver.\*

So in Maine, in an action of assumpsit for a quantity of limestone, the Court said :

"In general the delinquent party is holden to make good the loss occasioned by his delinquency. But his liability is limited to the direct damages, which, according to the nature of the subject, may be contemplated or presumed to result from his failure. Remote or speculative damages, although susceptible of proof and deducible from the non-performance, are not allowed; and if the party injured has it in his power to take measures by which his loss may be less aggravated, this will be expected of him. If a party entitled to the benefit of a contract, can protect himself from a loss arising from a breach, at a trifling expense, or with reasonable exertions, he fails in social duty if he omits to do so. For example, a party contracts for a quantity of bricks to build a house, to be delivered at a given time, and engages masons and carpenters to go on with the work. The bricks are not delivered. If other bricks, of an equal quality and for the stipulated price, could be at once purchased on the spot, it would be unreasonable by neglecting to make the purchase, to claim and receive of the delinquent party damages for the workmen, and the amount of rent which might be obtained for the house, if it had been built."†

So in trespass in Massachusetts, it appearing that the defendant had broken down the plaintiff's fence in November, but that the plaintiff did not repair the breach till May, in consequence of which, cattle got in and destroyed the crop of the next year, and the claim being for the loss of the subsequent year's crop, as well as the expense of repairing the fences, the Supreme Court said :‡

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\* *Flower vs. Adam*, 2 Taunt., 814; *S. P. Butterfield vs. Forester*, 11 East, 60.

† *Miller vs. Mariners' Church*, 7 Greenleaf, 51. The same language is held in *Iowa, Davis vs. Fish*, 1 Iowa, 407.

‡ *Loker vs. Damon*, 17 Pick., p. 284, per Shaw, C. J.

"In assessing damages, the direct and immediate consequences of the injurious act are to be regarded, and not remote, speculative, and contingent consequences, which the party injured might easily have avoided by his own act. Suppose a man should enter his neighbor's field unlawfully, and leave the gate open; if, before the owner knows it, cattle enter and destroy the crop, the trespasser is responsible. But if the owner sees the gate open, and passes it frequently, and wilfully or obstinately, or through gross negligence, leaves it open all summer, and cattle get in, it is his own folly. So, if one throw a stone and break a window, the cost of repairing the window is the ordinary measure of damage. But if the owner suffers the window to remain without repairing a great length of time after notice of the fact, and his furniture, or pictures, or other valuable articles, sustain damage, or the rain beats in and rots the window, this damage would be too remote. We think the jury were rightly instructed, that as the trespass consisted in removing a few rods of fence, the proper measure of damage was the cost of repairing it, and not the loss of a subsequent year's crop, arising from the want of such fence."\*

We shall hereafter see that this principle has been frequently applied to nuisances, to cases of collision, and in many other instances. But we shall find that the language here used is intended to be subject to the qualification that the negligence, or other misconduct of the plaintiff, has actually increased the difficulty. The mere fact of the conduct of the plaintiff being irregular, is of no consequence, unless his misconduct has tended to aggravate the injury.†

To the same general principle which we are now considering, the subject of counsel fees appears properly referable. The law awards to the successful party his taxable costs, but the fees which he pays to counsel are not taken into consideration.

So in an action of *assumpsit*,‡ the Supreme Court of Massachusetts said, that "the expenditure for counsel fees is an item ordinarily to be borne by the suitor, except so far as it may be remunerated by the taxable costs for the travel and attendance of the party, and the allowance of an attorney's fee." "In actions of debt, covenant and *assumpsit*, the plaintiff can recover but legal costs as compensation for his expenditure in the suit, and as punishment to the defendant for his unjust detention of the debt."

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\* And see *Thompson vs. Shattuck*, 2 Metcalf, 615.

† Vide Post, Ch. XVIII., of Torts generally.

‡ *Guild vs. Guild*, 2 Met., 229.

§ *Stimpson, vs. the Railroads*, Wallace Jr., 164, per Grier, J.

We have already had occasion to notice that legal relief is at best but partial.\* Under the Roman law the successful party was not restricted to a suit for malicious prosecution, and the party justly chargeable with making a totally ungrounded claim or defence, was punished by a pecuniary mulct. And this, at one time, seems to have been adopted into the jurisprudence of modern Europe. Francis the First, by his ordinance of 1539, Art. 88, authorized the judge to inflict damages proportioned to the "temerity" of the losing party.† And so, too, in England, originally it seems that the plaintiff in all cases of unsuccessful litigation, might be amerced *pro falso clamore*, and the amerciament [*a merci*, Fr.] was affeered [*affier*, Fr.] or assessed by the court or its officers. This power, however, no longer exists, and in cases of contract no redress is given beyond the taxable costs. Even in cases the most frivolous and vexatious, in no case is any independent redress given, *i. e.* by a recriminatory action, unless the first suit or proceeding be malicious. Malice and want of probable cause must concur.‡ This principle is rigorously applied to counsel fees in all cases of contract, and without discrimination to both parties to the litigation. We are now speaking of counsel fees in the principal suit, for as we shall see when we come to investigate the subject of the covenant of seizin, that of principal and surety, and some others, counsel fees in former suits are frequently allowed.§ So in Connecticut, in an action of assault and battery, where, in consequence of the death of a juror, a second trial became necessary, it was held that the jury, in estimating the damages, might take into consideration the expenses of the first trial.|| But in suits brought on contracts, counsel fees in those particular suits have never been allowed.

In actions of tort, different opinions have been pronounced. There may be, and often are, cases nominally in tort, where no actual wrong in the moral sense of the term is complained of,

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\* Ante, 87, 88.

† Merlin; Repertoire, in voc. Dommages-Interêts.

‡ Savil *vs.* Roberts, 1 Salk., 14; Purton *vs.* Honnor, 1 Bos. & Pull., 205; Vanduzor *vs.* Linderman, 10 J. R., 106; Donnell *vs.* Jones, 18 Alaba. N. S., 490, 501.

§ Staats *vs.* Ex'rs of Ten Eyck, 8 Caines, 111; Kingsbury *vs.* Smith, 18 N. H. R., 122; Swett *vs.* Patrick, 12 Maine, 9; Beale *vs.* Thompson, 3 B. & P., 407; Pitkin *vs.* Leavitt, 18 Verm. R., 879; Allen *vs.* Blunt, 2 Wood. & M., 121.

|| Noyes *vs.* Ward, 19 Conn. R., 250.

and it is in these cases that the question properly arises; for where the act complained of is tainted by fraud, malice, or insult, the jury which has power to punish, has necessarily the right to include the consideration of the probable counsel fees in their estimate of vindictive or exemplary damages. Perhaps this distinction has not been sufficiently kept in mind.

In Massachusetts, the Supreme Court has refused to allow counsel fees in an action on the case for setting a fire on the defendant's own land, whereby the plaintiff's wood was consumed, holding that it was immaterial with reference to the damages, whether the accident resulted from *gross negligence*, or merely the want of *ordinary care*.\* "It is now well settled," said the Court, "that even in an action of trespass or other action sounding in damages, the counsel fees and other expenses of prosecuting the suit not included in the taxed costs, cannot be taken into consideration in assessing damages."

And the Supreme Court of New York have laid down the same rule in an action on the case for negligence against a railroad, for injuries to the person, which we have already noticed.†

But in an action on the case brought in Connecticut, these decisions were reviewed, and after stating the rule allowing vindictive or exemplary damages, the Court proceeded to use this sound and logical language:

"The argument in opposition to the doctrine of the charge is substantially founded upon the assumed principle, that the defendant cannot be subjected in a greater sum in damages, than the plaintiff has actually sustained. But every case in which the recovery of vindictive damages has been justified, stands opposed to this argument. And we cannot comprehend the force of the reasoning which will admit the right of a plaintiff to recover as vindictive damages,

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\* *Barnard vs. Poor*, 21 Pick., 878. The decisions on this subject in Massachusetts, curiously illustrate the oscillations of the judicial pendulum. In *Cole vs. Fisher*, 11 Mass., 187, where trespass was brought, it was said that whether the action should have been trespass or case was immaterial, because the expenses of the first suit would be a ground of further damage. In *Rice vs. Austin*, 17 Mass., 197, a case of trespass, but without aggravation, the court were divided as to the allowance of counsel fees. In *Leffingwell vs. Elliott*, 10 Pick., 204, on the covenants against incumbrance and warranty, they were disallowed, and finally, in *Barnard vs. Poor*, 21 Pick., 878, they were rejected in an action of trespass for gross negligence. It is very plain, that whatever may be the merit of these cases, they do not support each other; they are not in *pari materia*.

† *Lincoln vs. Saratoga and Schenectady R. R. Co.*, 28 Wend., 425; *Supra*, 83.

beyond the amount of injury confessedly incurred, and in case of an act and injury equally wanton and wilfully committed or permitted, will deny to him a right to recover an actual indemnity for the expense to which the defendant's misconduct has subjected him. In the cases to which we have been referred in other States, as deciding a different principle, the courts seem to have assumed, that the taxable costs of the plaintiff are his only legitimate compensation for the expense incurred. If taxable costs are presumed to be equivalent to actual necessary charges, as a matter of law, every client knows as a matter of fact, they are not. And legal fictions should never be permitted to work injustice."\*

And in Alabama, in an action for malicious prosecution, the Supreme Court has said, while recognizing the conflict of authority, "We can readily perceive the justice and good sense of the rule which requires a party who wantonly and maliciously abuses the process of the Court, or sues out an attachment for the purpose of worrying and harrassing the defendant, without probable cause, to make good his losses and to furnish complete reparation and indemnity for the injury his malice has occasioned," and the defendant's counsel fees for defending the original suit, were allowed to be "proven and taken into consideration by the jury."†

And it may, on principle, I think, be considered clear that in cases proper for the infliction of exemplary or vindictive damages, the jury in estimating those damages, have a right to take into their consideration the probable expense of the litigation. The question, however, still remains, whether counsel fees can be allowed in cases technically of tort, but where no actual fraud or malice is alleged.

In an action on the case for flowing back the water of a river in Maine, on the plaintiff's lands, although no malice was proved, Judge Story told the jury, "that for the purpose of giving a full indemnity, they might take into consideration such expenses of fees to counsel, and such other necessary expenses, as they might think were properly and fairly incurred;" and on a motion made for a new trial on the ground that the damages were excessive, the court refused to interfere.‡

In an early case§ in the Supreme Court of the United

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\* *Linsley vs. Bushnell*, 15 Conn. R., 225.

† *Marshall vs. Betner*, 17 Ala., 833.

‡ *Whipple vs. Cumberland Manufacturing Co.*, 2 Story, 461.

§ *Arcambel vs. Wiseman*, 3 Dall., 306.

States, of a libel filed by the Spanish consul, for restitution of a Spanish vessel, captured by a French vessel, it appeared that a charge of sixteen hundred dollars for counsel fees in the courts below had been admitted, and the court said, "We do not think that this charge ought to be allowed. The general practice of the United States is in opposition to it."

In an action for the violation of a patent right,\* Story, J., at the trial, considered it the established rule, in estimating damages, in cases of mere tort, whether the action was for redress of a personal injury, or the vindication of a personal right, to allow counsel fees and the expenses of witnesses, beyond the taxable costs, as items of actual damage: on a review of the question, however, he overruled his own decision, on the authority of the preceding case.

But subsequently† the same learned judge examined the case of *Arcambel vs. Wiseman* at length, and declared it shaken so far as it could be considered as containing any general doctrine; and in the principal case, which was a patent suit, "he returned to what he originally considered the true doctrine, namely, that the jury are at liberty, if they see fit, to allow the plaintiff, as part of his actual damage, any expenditure for counsel fees, or other charges which were necessarily incurred to vindicate the rights denied under his patent, and are not taxable in the bill of costs." It is to be borne in mind that these cases turned on the construction of the phrase "actual damage," in the Patent Law.‡ And he subsequently adhered to the doctrine. In one of the latest cases tried before him on

\* *Whittemore vs. Cutler*, 1 Gall, 429.

† In *Boston Manufacturing Co., vs. Fiske*, 2 Mason, 120.

‡ In admiralty it has been since said, by the Supreme Court of the United States, to be the common course to allow counsel fees, either in the shape of damages, or as part of the costs, and that as well on the instance as the prize side of the court; and such an allowance was once made to the extent of five hundred dollars. *The Apollon*, 9 Wheat., 168; and *Canter vs. American and Ocean Ins. Company*, 8 Peters, 807. In *the Mary*, 9 Cranch, 126, a capture case, though the libel was dismissed, the captors were allowed their reasonable costs and expenses, on the ground that there was probable cause of capture.

In *the Amiable Nancy*, 8 Wheaton, 546 and 562, costs and expenses were allowed.

In *the Venus*, 5 Wheaton, 127, captor's costs and expenses were allowed. And the same decision was made in the case of *the London Packet*, 5 Wheaton, 122. These cases are cited by the learned reporter at the end of the above case, but unless "expenses" include "counsel fees," they do not bear upon the question.

the Rhode Island circuit, he used this language: "If the plaintiff has established the validity of his patent, and that the defendants have violated it, he is entitled to such reasonable damages as shall vindicate his right, and reimburse him for all such necessary expenditures as have been necessarily incurred by him beyond what the taxable costs will repay, in order to reestablish that right. \* \* My understanding of the law is, that the jury are at liberty, in the exercise of a sound discretion, if they see fit, (I do not say that they are positively and absolutely bound under all circumstances,) to give the plaintiff such damages, not in their nature vindictive, as shall compensate the plaintiff fully for all his actual losses and injuries, occasioned by the violation of the patent by the defendants."\*

But on the Pennsylvania Circuit, the correctness of these decisions has been denied. It was said that this doctrine had been introduced from courts of admiralty, which could not afford proper precedents for tribunals following the course of the common law—that the term "actual damages" in the Patent Act did not countenance the doctrine—and that if permitted, it would introduce a great inequality between the plaintiff and the defendant, who could in no case recover his counsel fees; and on these grounds counsel fees were declared not capable of being included in the estimate of the plaintiffs damages.†

The question had been previously considered on the same circuit, in an action of trespass against the Marshal of the U. S., for making an illegal levy on certain teas; and no circumstances of aggravation being shown, Mr. Justice Baldwin held that this being so, the jury could not allow the plaintiff his counsel fees by way of damages. He said:

"It may be thought a hardship that the plaintiffs shall not be allowed their actual disbursements in recovering their property; but the hardship is equally great in a suit for money lent, or to recover possession of land, they are deemed in law losses without injury, for which no legal remedy is afforded. I am, therefore, of opinion that you cannot, in assessing damages in this case, allow any of the items claimed by the plaintiffs for disbursements, they being consequential losses only, and not the actual or direct injury to the property which they have sustained by its seizure and detention, for which alone they are en-

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\* *Pierson vs. Eagle Screw Co.*, 3 Story, 402; and so, too, held by Judge Woodbury, in the same circuit, *Allen vs. Blunt*, 2 Woodb. & M., 121.

† *Stimpson vs. the Railroads*, Wallace Jr., 164.

titled to recover damages in this case, it not being attended with any circumstance of aggravation on the part of the defendant. Had there been any such, a very different rule would have been applied by reimbursing the plaintiffs to the full extent of all their expenses and consequential losses.”\*

And so far is the principle carried the other way in Massachusetts, that a trustee, (or garnishee,) in whose hands the funds of the debtor are found, can retain nothing to meet the expenses of litigation.†

It is not easy to say what should be the general rule on the subject, though it is evident that great incongruity has crept in. Nothing is more difficult than to fix the precise limit to which society should go in awarding reparation by means of its civil tribunals. Legal relief is at the best extremely imperfect, and the charges of counsel are a very formidable item in those expenses which tend so largely to reduce to the plaintiff the real benefit of his recovery; while on the other hand, it may be said with great force, that the questions submitted to legal discussion are often so vexed, that it is very doubtful whether the prevailing party is really entitled to a complete reimbursement; and that if absolute indemnity were given, a great stimulus would be furnished to litigation.

But at all events, the same rule should be applied to all cases that contain no element of actual fraud, malice, or vexation; the plaintiff and defendant should be treated alike, and whether the form of the action be *ex contractu*, or *ex delicto*, the remuneration, as far as counsel fees is concerned, should be similar. “If this principle be introduced from the civil law,” says Mr. Justice Grier on the Pennsylvania Circuit, “both parties should have the benefit of it; a defendant should not be left to contend with such odds against him. In actions of contract, the plaintiff can recover but legal costs. His equity is no greater, nor his injury of a higher order when his action is for a trespass or a tort.”‡

Principles analogous to those which we are now considering, also govern the allowance of damages which arise after the commencement of the suit, or, as they are sometimes termed,

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\* *Pacific Ins. Co. vs. Conard*, 1 Baldwin, 138.

† *Adams vs. Cordis*, 8 Pick., 280.

‡ *Stimpeon vs. the Railroads*, Wallace, Jr., 164.



prospective damages. The rule is perfectly clear and imperative, that where the act complained of, which is the origin of the damage, took place after suit brought, it cannot be given in evidence. So where\* debt was brought against the marshal of the marshalsea, for an escape, and the plaintiff offered to give evidence of an escape after the commencement of the suit, and before the time of pleading, Tindal, C. J., of the Common Pleas, said: "It is quite clear that the plaintiff can derive no aid from any thing occurring after the commencement of the action."

In a recent action for a libel, which had led to the plaintiff's arrest, both before and after the commencement of the suit, it was held that the defendant might insist that all that took place subsequent to the bringing of the action should be excluded from the consideration of the jury, but that after consenting to the admission of evidence in regard to what took place after the commencement of the suit, the jury were at liberty to take it into consideration.† So in slander, no evidence can be given of words spoken after the commencement of the action.‡

But where the act complained of was committed before suit brought, and a good cause of action exists, it often becomes a question whether any allowance can be made for prospective damages, or damages which accrue after action brought. "The general rule in personal actions," says Chief Baron Comyns, "is that damages are allowed only to the time of the action commenced."§ "Judgments," says the Constitutional Court of South Carolina, "generally refer to the situation of the parties at the commencement of the suit. If at that time the plaintiff had no cause of action, he must suffer a nonsuit. It is then the defendant is informed of the wrong with which he is charged and the redress which is demanded. The declaration, which is but an amplification of the writ, must set forth the form and manner of the injury, to enable the defendant to file the pleas necessary to his defence, and the judgment must correspond with the pleadings. If new matter be introduced subsequent to the

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\* Davis *vs.* Chapman, 8 Scott New Rep., 288.

† Goslin *vs.* Corry, 7 Mann. & Gr., 343.

‡ Root *vs.* Lowndes, 6 Hill, 518; Keenholts *vs.* Becker, 8 Denio, 346.

§ Comyns' Digest, Damages, D; and Robert Pitfold's case, 10 Coke, 117.

pleadings, the defendant may be surprised, and the judgment of the court may not conform to the pleadings.”\*

So in an early action on the case where the plaintiff declared for procuring his apprentice to depart from his service, and for the loss of his service for the whole residue of the term of his apprenticeship, and the jury assessed damages generally, judgment was arrested, because it appeared that the term was not expired at the commencement of the suit.† So, too, in *Massachusetts*, it has been said: “The cases are decisive that by the common law the plaintiff can recover damages only to the time of bringing the action, and that in this respect there is no distinction between actions of covenant and of tort.”‡

But the application of this general principle is often attended by serious embarrassment, both in actions of covenant and of tort; the former where the agreement covers a long space of time, and the latter where the wrongful act is followed by injurious consequences. The question is, in the former case, whether the agreement is to be treated as a continuing one, and a fresh action brought for every breach, or whether on the first breach final damages must be assessed. And so in regard to torts, whether but one action can be brought, or whether a new suit must be had for the consequences after they have appeared.§

As a general proposition, it may be said that the plaintiff is at liberty to prove, and the jury are bound to take into consideration those direct and immediate consequences of the act complained of, which are so closely connected with it that they would not of themselves furnish a distinct cause of action. But it is very difficult in many cases to define the point where the law will stop in the investigation of these probable consequences. The question was early considered by Lord Holt, in a case of tort.|| The plaintiff declared of a battery, alleging that he had previously brought an action for it against the defendant, and recovered £11, and no more; and that afterwards part of his skull, by reason of the said battery, came out of his head,

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\* *Duncan vs. Markley*, 1 Harper's Rep., 276.

† *Hambleton vs. Veere*, 3 Saund., 196.

‡ *Powers et al. vs. Ware*, 4 Pick., 106; *Pierce vs. Woodward*, 6 Pick., 206. See, also, *Catherwood vs. Caslon*, 1 Car. & Marsh, 481.

§ We shall have occasion to discuss this subject again under the head of Contracts, Ch. VII., in speaking of Continuing Agreements.

|| *Fetter vs. Beal*, 1 Lord Raymond, 839. 1 Salk., 11, S. C.

and for this subsequent damage the suit was brought. The defendant pleaded the recovery in bar, and demurrer. And Shower, *pro querente*, argued, "that if a consequence will take away an action, for the same reason it will give an action." But judgment was given for the defendant, the whole court being of opinion "that the jury, in the former action, considered the nature of the wound, and gave damages for all the damage that it had done the plaintiff." The case was moved again,\* when Holt, C. J., said: "If this matter had been given in evidence as that which *in probability might have been* the consequence of the battery, the plaintiff would have *recovered damages for it*. The injury, which is the foundation of the action, is the battery, and the greatness or consequence of that is only in *aggravation of damages*."

So where the defendant was employed as an attorney, to investigate securities on which a loan was to be made, and it was alleged that he had neglected to use proper care, and that the securities had proved defective, that a large amount of interest was lost, and that probably a portion of the principal would be also lost; the statute of limitations was pleaded, and it appeared that the examination of the title took place in 1814; but that the insufficiency was not discovered till 1820, up to which time the interest was paid. It was insisted that the statute ran, not from the time when the insufficient security was taken, but from the period when the special damage alleged in the declaration, viz., the loss of interest, accrued. But the statute was held a good bar, and Holroyd, J., said: "If the action had been brought immediately after the insufficient security was taken, the jury would have been bound to give damages for *the probable loss*, which the plaintiff was likely to sustain from the invalidity of the security."† And the authority of this case was very recently recognized in the Court of Chancery, by Mr. Vice Chancellor Wigram.‡

In a very analogous case, an action of assumpsit against an attorney for negligence, the Supreme Court of the United States said: "When the attorney was chargeable with negligence,

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\* *Ib.*, 692.

† *Howell vs. Young*, 5 B. & Cres., 259. See *Gillon vs. Boddington*, 1 B. & M., 161.

‡ *Smith vs. Fox*, 12 Jur., 180, 21 and 26 Jan'y, 1848. See 2 *Saund.*, by Williams, n. 63, E.

his contract was violated, and the action might have been sustained immediately. Perhaps, in that event, no more than nominal damages may be proved, and no more recovered; but on the other hand, it is perfectly clear that the proof of actual damages may extend to facts that occur and grow out of the injury, even up to the day of the verdict.”\* But where the act itself is lawful, and the action is sustained only in consequence of special damage, as in case of an overflow of lands by reason of a culvert being negligently erected by a Railroad Company, here the statute only begins to run from the time that the consequential injury occurred.†

In Kentucky, also, the rule is recognized that loss, accruing subsequent to the suit, may be recovered where the subsequent damages are the mere incident or accessory of the principal thing demanded, and no action can be maintained for them.‡ But in the same State, in an action on the case for diverting the water of a stream, it was held by the Court of Appeals, that the plaintiff could legally recover only for damages he had sustained up to the commencement of the suit.§ And so in South Carolina, in an action on the case for damages occasioned by a nuisance, damages sustained after action brought have been held not to be recoverable.¶

In New York also, the same rule has been laid down in a similar case, brought by tenant for one year, against his landlord for obstructing his lights; but in delivering its judgment, the Court said: “Suppose the lease to have contained a covenant not to obstruct the light, and the action to have been brought on such covenant, the rule of damages would be otherwise, for the covenant being a single cause of action, one recovery on it would be an absolute bar to any further action.”¶ And this brings us to the consideration of the subject of prospective damages, as connected with cases of contract.

The rule arbitrarily limiting the damages to the commencement of the suit, was so long adhered to, that up to the time of

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\* *Wilcox et al., vs. Ex'rs of Plummer*, 4 Peters, 172 and 182.

† *Delaware and Raritan Canal Co. vs. Wright*, 1 Zabriske New Jersey R., 469.

‡ *Trigg vs. Northcut*, Lit. Sel. Cas., 418.

§ *Langford vs. Owaley*, 2 Bibb., 215. In Illinois see *Greenup vs. Stoker*, 2 Gillman, 688.

¶ *Duncan vs. Markley*, Harper's Rep., 276.

¶ *Blunt vs. McCormick*, 3 Denio., 233.

Lord Mansfield, even in actions of assumpsit, it seems to have been the practice to compute the interest only to the time of the bringing of the action; that great judge, however,\* declared the true doctrine, and said: "It is agreeable to the principles of the common law, that whenever a duty has been incurred pending the writ, for which no satisfaction can be had by a new suit, such duty shall be included in the judgment to be given in the action already depending." But "in trespass, and in tort, new actions may be brought as often as new injuries and wrongs are repeated, and therefore damages shall be assessed only up to the time of the wrong complained of."

So, if by reason of any default, a party is made liable to pay money, the right of action is vested, and suit can be maintained against the one in default. And on the trial evidence may be given, and recovery had of sums paid subsequent to the commencement of the suit, by reason of the previous liability. But in these cases it is necessary that care should be taken to make the declaration broad enough to cover the expenses to which the plaintiff is apprehensive he may be put. Thus, where suit was brought on an agreement to assign certain premises to the plaintiff, and the breach assigned was that the defendant did not make out a good title, by reason whereof the plaintiff had been necessarily "put to great expense," in and about investigating the title, the plaintiff sought to recover the amount of his attorney's bill, and broker's bill, both of which had been paid after the commencement of the suit. It was insisted that the allegation of damages was erroneous, and that merely being liable to pay, he had not been *put to expense*. But it was held sufficient by the Queen's Bench, Lord Denman, C. J., saying, "If the plaintiff alleges he has paid money, he must prove it; but if he says that he has been put to expense, I think we may fairly hold that such an allegation amounts to no more than that the plaintiff has incurred the liability to pay certain expenses."†

So in Massachusetts, in suits on the covenant of warranty and against incumbrances, the plaintiff may recover the amount

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\* Robinson *vs.* Bland, 2 Burr., 1077, and 1086.

† Richardson *vs.* Chasen, 10 Q. B. R., 756, and see the cases there cited.

fairly and justly advanced to remove the incumbrance, though paid after the suit begins.\*

So where the plaintiff sued the defendant on a contract made in 1810, to deliver spring wheat, alleging that the plaintiff had re-sold the wheat to one Shephard as spring wheat, but that it was in fact winter wheat, and that in consequence thereof it failed; hereupon Shephard sued the plaintiff, and recovered a judgment, which the plaintiff paid in 1818, and then brought this suit. The Statute of Limitations was pleaded, and the Court of King's Bench held it a good bar, saying that the breach of contract was the gist of the action, and that the special damage was stated merely as a measure of the damages resulting from that cause of action, and Bayley, J., said, "If the plaintiff had failed in proving the special damage in the case, it would not have been a ground of nonsuit."†

The subject which we are now considering is closely connected, as I have said, with that of continuing agreements, or agreements covering a long space of time. In an action of covenant by trustees of wife against the husband, on his covenant to pay off certain incumbrances within twelve months, although no special damage was laid or proved, it was held that the plaintiffs were entitled to a verdict for the whole amount of the incumbrances.‡

We have already seen, that the day of the breach of a covenant to pay for articles furnished for a building, is in New York held the time at which the damages are to be estimated, provided the plaintiff elects to consider it in that light, although the covenant is broken before the time fixed for full performance.§

And thus, perhaps, we are furnished with the elements of a sound and reasonable rule; which varies, however, as the case is one of contract or of tort. If the former, and if the original breach of contract is such that the plaintiff, at all events, would be entitled to nominal damages, then he can go on to give in

\* *Leffingwell vs. Elliott*, 10 Pick., 204; *Brooks vs. Moody*, 20 Pick., 474.

† *Battley vs. Faulkner*, 8 B. & Ald., 288. It may, perhaps, be doubted whether the damage here complained of was not too remote to be taken into consideration, but the question does not appear to have been discussed.

‡ *Lethbridge vs. Mytton*, 2 B. & Ad., 772.

§ *Supra*, 76, *Masterton vs. Mayor, &c.*, 7 Hill, 72.

evidence those consequences of the act which are immediately traceable to it, although they have taken place after the commencement of the suit.\* The English decisions are founded on the idea that damages are to be given for the *probability* of loss, as said by Holroyd, J., in *Howell vs. Young*;† but it appears to me that in cases of contract the American rule, as we have seen suggested above by the Supreme Court of the United States, in *Wilcox vs. Plummer's Ex'rs.*,‡ is the more correct.§ *Actual compensation* should never be given for merely *probable damage*. If there is a breach of contract, the right to nominal damages exists at once to vindicate the right, and suit may be brought; if those consequences of the act for which the law renders the party in default responsible, have developed themselves so as to create absolute injury before the verdict, the jury are bound to give compensation for such injury; but if at the time of trial the loss is still only probable, the verdict should be but for nominal damages. The question in regard to Continuing Agreements, or agreements covering a long space of time, although frequently confounded with the one under consideration, is in truth wholly distinct from it. Where an agreement covers a long period and is broken, there is no doubt that suit may be brought at once. Nor is there any doubt that prospective damages for the whole time covered by the contract may be obtained. A question has indeed been raised whether the day of the breach is to fix those damages; that is, whether they are to be computed according to the state of things existing on that day, and on the assumption that such state of facts would not change during the time the agreement has to run, or whether proof should be gone into as to any fluctuations that may have taken place prior to the trial of the cause, and the rights of the parties determined by the precise facts. But this is rather a question of evidence, which we shall consider more at large hereafter. It does not touch the question of prospective damages, which in cases of contract is governed by the rule stated above.

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\* The authority of the English cases, as to the effect of the Statute of Limitations, has been recently recognized in New York; *Rodman vs. Hedden*, 10 Wend., 498.

† *Supra*, 104.

‡ *Supra*, 105.

§ See this question ably discussed, but left undecided, in Alabama, in *Snedicor vs. Davis*, per Chilton, J., 17 Ala., 472.

But on the other hand, if the case be tort, and the wrong done before suit brought, then the plaintiff is not limited solely to the consequential damage which has actually occurred up to the trial of the cause, but he may go on to claim relief for the prospective damage which can then be estimated as reasonably certain to occur. So in an action of tort for wounding the plaintiff's servant, the jury may give damages for the loss of service, not only before action brought, but afterwards, down to the time when, as appears in evidence, the disability may be expected to cease.\* And therefore fresh damage merely will not give a fresh action, and a judgment in a suit found on a single act of tort, will be a conclusive bar to a second suit for the same injury, although harmful consequences may have made themselves apparent subsequent to the first suit, as it will be held that in the first verdict the plaintiff recovered all he was entitled to claim. But where there is a repetition or continuation of the trespass, then of course a fresh action will lie; in other words, as it is sometimes said, injury and damage must concur.

The decisions which we have thus reviewed, show that the rule is by no means universal that the rights of either party, whether plaintiff or defendant, are absolutely concluded by the state of facts at the time of the commencement of the suit. As many events which occur, or which appear certain to occur after suit brought may increase the plaintiff's demand, so there may many defences arise after the bringing of the action which will be fatal to it. And the question has often been discussed whether such defences can be shown under the general issue, or must be specially pleaded. In an early case, where the captain of a man-of-war was sued by the master of a trading vessel which he had seized as a smuggler, he was allowed by Lord Mansfield to prove, under the general issue, a certificate of probable cause, which was a flat bar to the action, although given several months after suit brought, but before plea pleaded.† But this doctrine has been since overruled. And it is now settled that where a matter of defence

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\* *Hodsoll vs. Stallebrass*, 11 Ad. & E., 301. And this decision has been fully adopted in a well reasoned case in Vermont; *Adm'r of Whitney vs. Clarendon*, 18 Verm., 252; but see the dissenting opinion of C. J. Williams.

† *Sullivan vs. Montague, Doug*, 188.



arises after action brought, it should be pleaded ; and not merely in bar of the action, but specially pleaded in bar of the further maintenance of the suit ; as where the plaintiff has become an alien enemy after bringing his action.\* And if it arises after the plea put in, it must be pleaded *puis darrein*. The principle of these cases has been recognized in this country.† So payment after action brought cannot be given in evidence under the general issue.‡ In the King's Bench, however, where the declaration is considered the commencement of the suit, a payment after the writ, but before the declaration can be given in evidence under the general issue.§

In a recent case in the Queen's Bench, in an action of trespass for taking goods, the defendant having pleaded only the general issue, it was held that he could not, even in mitigation of damages, give in evidence a repayment by him after action brought, of money produced by the sale of the goods. And Lord Denman, C. J., said : "The rights of parties at the trial are the same as they were at the commencement of the suit ; or if they are changed, a plea *puis darrein continuance* ought to place the new facts on the record. It is important to uphold the principle that a plaintiff is entitled to recover, by way of damages, all that at the commencement of the suit he has lost, through the wrongful act for which the defendant is sued."¶ We shall have occasion to refer to this subject again when treating of Recoupment.¶

An important question connected with this branch of our subject has frequently presented itself as to the liability of grantees of a public franchise, or the public agents of government, for consequential damages resulting from the exercise of the powers granted to them, as, for instance, in the case of canal and railroad corporations, or commissioners of public works. The question sometimes arises in actions of trespass, sometimes in actions on the case ; but the rule is substantially the same, whatever the form of action. And the general rule is, that where the grantees or agents have not exceeded the

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\* *Le Bret vs. Papillon*, 4 East, 508 ; *Lee vs. Levy*, 4 Barn. & Cres., 390.

† *Covell vs. Weston*, 20 J. R., 414.

‡ *Boyd vs. Weeks*, 2 Denio, 321.

§ *Worswick Adm'r vs. Berwick*, 10 Barn. & Cres., 676.

¶ *Rundle vs. Little*, 6 Q. B. R., 174.

¶ Post, Chap. XVII.

power conferred on them, and when they are not chargeable with want of due care, no claim can be maintained for any damage resulting from their acts; *actus legis nemini est damnosus*.

Otherwise the absurdity would follow that operations undertaken and conducted by virtue of the supreme authority, are unauthorized in the view of the law, and lay a foundation for damages. The proper light in which to regard the matter is to consider the grantee of the franchise, or the public agent, so long as he does not transcend the authority conferred on him, as representing the government, and the government as acting under its right of eminent domain, subject, of course, to its liability to make compensation, and to that liability only.\* And the protection is extended not merely to the immediate grantees of the franchise, or the immediate agents of the

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\* So in Pennsylvania, neither the State nor a person, artificial or natural, acting by its authority under a law which the legislature is competent to make, is answerable for consequential damages occasioned by the construction of a highway any further than is specially provided by the law itself. *Henry vs. Pittsburgh Bridge Co.*, 8 Watts & Serg., 85. See, also, *Callender vs. Marsh*, 1 Pick., 418, 430; *Boston and Roxbury Mill Dam Corporation vs. Newman*, 12 Pick., 467; *The Boston Water Power Co. vs. The Boston and Worcester R. Road Corporation*, 16 Pick., 512; and S. C., 28 Pick., 360; *King vs. The Severn and Wye Railroad Co.*, 2 B. & Ald., 646; *Gov. & Co. of the British C. P. Manufactory vs. Meredith*, 4 T. R., 784; *Sutton vs. Clark*, 6 Taunt., 29; *Wardens and Commonalty of the Mystery of Grocers vs. Downe*, 3 Scott, 356; *Bolton vs. Crowther*, 4 D. & R., 195; *King vs. Commissioners of Sewers*, 8 B. & C., 355; *Queen vs. Eastern Counties Railway Co.*, 1 Gale & Davidson, 589; *Lehigh Bridge Co. vs. Lehigh Coal and Navigation Co.*, 4 Rawle, 9; *Lanaing vs. Smith*, 8 Cowen, 146; *Steele vs. President & Co. of Western Inland Lock Navigation*, 2 Johns., 388; *Livingston vs. Adams*, 8 Cowen, 175; *Jermaine vs. Waggoner*, 1 Hill, 279; and *Waggoner vs. Jermaine*, S. C. in Error, 7 Hill, 857; *Graves vs. Otis*, 2 Hill, 466. Any inconvenience or damage suffered in consequence of the proper and reasonable repairs of a public highway by a plank-road corporation, in the legitimate exercise of the powers conferred by the Statute, is *damnum adeque injuria*, and no action lies; *Benedict vs. Goit*, 3 Barb. S. C. R., 459; *Bord. & So. Amboy T. Co. vs. The Camden & Amboy R. Co.*, 2 Harr., 214; *Hollister vs. Union Co.*, 9 Conn., 436; *Hooker vs. New Haven and Farmington Co.*, 14 Conn., 146. *Burroughs vs. Housatonic R. Road Co.*, 15 Conn., 124. The cases are not in perfect accord with each other, but they sustain substantially the doctrine in the text. See, also, a very clear and satisfactory exposition of the subject in the *American Law Magazine*, April, 1843, p. 5, from which many of these authorities are taken. The whole subject was recently examined in *Radcliff's Ex'rs vs. Mayor of Brooklyn*, 4 Comstock, 195. The doctrine of the text was affirmed, and it was held that persons acting under an authority conferred by the legislature, to grade, level and improve streets and highways, if they exercise proper care and skill, are not answerable for the consequential damages which may be sustained by those who own land bounded by the street or highway. But in New Jersey, see *Delaware and Raritan Co. vs. Lee*, 2 Zabriskie, 243, where a Canal Co. held liable for damage done to land flooded by the work.

government, but to the sub-agents or inferior employees who are acting under the same general authority. The loss sustained in all such cases is *damnum absque injuria*.\*

From the examination which we have thus made of this branch of our subject, it is apparent that it is difficult to lay down any general rules in regard to the extent to which the law goes in search of resulting damages. To facilitate any effort to reduce the subject to principle, a division of actions into three classes is necessary.

The *first* comprises those where a contract is made for the payment of money alone; and here it is well settled that the consequences of the non-performance cannot be inquired into in any way, and that payment of the principal sum with interest is the only compensation that can be looked for.

*Second*, those where the contract is to do, or to refrain from doing, some particular thing. Here the rule of the civil law is perhaps the best that can be adopted; that the party in default shall be held liable for all losses that may fairly be considered as having been in the contemplation of the parties at the time the agreement was entered into. Or, in other words, where it appears, or may fairly be inferred, that the party complaining of the non-performance of a contract has, at the time it was entered into, turned the mind of the party whose conduct is complained of to the consequences likely to ensue from default on his part, and such consequences do ensue, he shall be held responsible for them as having stipulated against them.

*Third*, those where a tort is committed, or the action is brought for a violation of right, unattended by any of those circumstances of aggravation which give the control of the matter to the jury. These cases are by far the most difficult to reduce to principle. We have no money standard to resort to, nor any agreement to guide us. The general rule in this class of cases is, to adhere as closely as possible to the maxim, that the natural and proximate consequences of the act are alone to be taken into consideration. This rule is, however, subject to the qualification that the motive and conduct of the defendant is to a certain extent to be taken into account, and that even in cases where vindictive damages can not be demanded,

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\* Vide *supra*, 81.

the law will go farther in quest of consequence, to punish a wrongdoer, than to redress an act of pardonable negligence. I state this qualification, as it is undoubtedly to be deduced from the adjudged cases. But its results are so serious that I may be permitted to draw the attention of the reader more fully to the matter. And I do not know that it can be done more satisfactorily than by following out the train of reasoning which the civilians adopt on the subject of *culpa* or legal liability. One of the most recent and best of the German writers, thus speaks :

“Responsibility or legal liability (*Imputatio*) exists whenever a person is the moral cause of an illegal act, and must bear the consequences thereof. *Culpa*, or legal fault, goes hand in hand with *imputatio*, or legal liability. It is that which fastens on the person charged the responsibility of the transaction, and consequently the phrases are often convertible, and *in culpa est* he is in fault, has the same meaning as *ei imputatur*, he is responsible.

“*Culpa* relates both to acts of trespass, or those embraced under the Aquilian Law, (*damnum injuria datum*) and to violations of contract. In the latter cases only is the learning of *culpa* intricate and difficult—in the former, easy and simple. In the cases which come under the Aquilian Law, *dolus* and *culpa* have the same effect, and the latter embraces almost everything ; but in matters of contract, the liability depends on the nature of the duty imposed upon the party charged ; he is sometimes answerable for *dolus* or *culpa lata* ; sometimes for *culpa* merely. It hence becomes necessary to distinguish more carefully between *dolus* and *culpa*, and especially to make the definition of *culpa lata* as clear as possible.”\* And a large

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\* “Zurechnung (*imputatio*) findet nämlich statt wenn jemand als moralische Ursache einer rechtswidrigen Handlung angesehen wird, so dass er die rechtlichen Folgen derselben tragen muss. Schuld (*culpa*) und Zurechnung gehen Hand in Hand ; jene bezeichnet dasjenige in dem Handelnden was ihm zur moralischen Ursache der Handlung machte, und daher bewirkte das sie ihm zugerechnet werden kann, daher diese Ausdrücke im ganzen denselben Sinn hervordringen, und es so oft für *in culpa est* heisst : *ei imputatur*.”—Hase, *die Culpa des Römischen Rechts*, § 13, p. 68.

“Nach der *Aquila* haben *dolus* und *culpa* gleiche Wirkungen, und die *culpa* umfasst jederzeit alles : im Obligationen recht richtet sich der Grad der *præstatio culpas* nach dem Grad der besondern Verpflichtung welche das bindende Verhältnisse mit sich bringt, und es wird zuweilen nur *dolus* und die ihm gleich stehende *culpa lata* gewöhnlich, aber auch mehr prästirt. Diese noch unbestimmte Bemerkung reicht hier

space is then devoted to an examination and definition of the three shades of illegality, *dolus*, *culpa lata*, *culpa levis*; a subject which, as it is discussed in all our treatises on Bailment, it is unnecessary to review here.

My object is to call attention to the practical result of the doctrine stated in the text, which is that in cases of tort, even where vindictive damages can not be demanded, the degree of fault will govern not only the question of liability, but the amount of remuneration; and accordingly, as the act is more or less morally wrong, so the courts will make the guilty party responsible for the consequences, more or less remote, of his conduct. It is very plain that this will introduce into the subject of wrongs all the nice distinctions which exist in the law of Bailments, and others still more perplexing; the tribunal will in each case have to decide not only a legal but a moral question, and to determine, moreover, the amount of consequences for which a given amount of immorality or negligence is to be made answerable. There seems at first sight reason in saying that a wrongdoer should be visited more severely with the consequences of conduct immoral as well as illegal, than when the act is simply the breach of positive law. But in a large class of cases, this difficulty is already obviated by the allowance of vindictive damages; and where this is not the case, there is inherent difficulty in drawing the nice distinctions which this rule requires. The danger to be apprehended is either that the courts will lose themselves in a maze of abstract casuistry, as to the different degrees of fault, or that in despair of reducing the subject to principle, they will throw the responsibility of the matter on the jury, leaving every thing to their vague, fluctuating and all but uncontrolled discretion.\*

Better, I humbly think, it would be in all matters of tort where the wrong is not so flagrant as to warrant vindictive damages, to adhere as closely as possible to a fixed rule; to declare that in no case, shall the measure of relief depend on

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noch hin um zuvörderst die Nothwendigkeit zu zeigen den *dolus* von der *culpa* s. str. genauer zu unterscheiden als es bei der Aquilianischen *culpa* nöthig war, und dabei vornämlich den Begriff der *culpa lata* so scharf als möglich zu fassen."—*Ib.*, § 16, p. 78.

\* Hasse, in his 12th Chapter, 400, admits and defends the almost absolute control over the subject, both of liability and remuneration, which the vagueness of the Roman law, in its definition of *culpa*, necessarily gave to the judge. The more loose the law, the more absolute, of course, the court.

the motive of the party, and that the remuneration is in all cases to be limited to the natural and proximate consequences of the act. Even this is vague enough, for language confesses itself incompetent to depict the nicer shades of right and obligation, and all rules will be found valueless unless applied and expounded by tribunals as sagacious as they are learned.

Having thus examined the general principles which govern the measure of damages in regard to the consequences of the act complained of, we now proceed to consider the rule of compensation in particular actions ; and first, of those in which are litigated claims to the Possession of Real Property.

## CHAPTER IV.

Rule of Damages in actions brought to recover the possession of Real Estate—In Real Actions generally—Ejectment—Trespass for meane Profits—Dower.

HAVING thus disposed of nominal and of remote or consequential damages, we proceed to consider the rules which govern the measure of compensation in the various forms of common law procedure. And first, of those actions which relate to the possession of real estate.

Five of the first chapters of Mr. Sayer's work on this subject, to which I have already referred,\* are devoted to a consideration of the law of damages in the actions of *Assize of novel disseisin*, *Entry sur novel disseisin*, *Assize of mort d'ancestor*, *Covinage*, *Aiel* and *Besiel*.

Many of the forms of real actions were introduced into America from the mother country,† and some still survive; but the particular actions above mentioned have been rarely, if ever, employed in the Union, and they were in England absolutely abolished by the statute 3 & 4 Will. IV., c. 27, § 36; for the "limitation of actions," which swept away, indiscriminately, between fifty and sixty species of proceedings, leaving as the only real or mixed actions, *a writ of dower*, *dower unde nihil habet*, *quare impedit*, and *ejectment*.‡

Repeated statutory changes have also been made in the various States on this same subject, the general result of which has been that the actions of ejectment or trespass to try titles and dower, are the only real or mixed actions now in extensive use in the Union. The action of *quare impedit*, relating to a

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\* Introduction, 1.

† As to the extent to which the real actions were adopted by us, see Kent's Commentaries, Vol. iv., 5th edit., 70, *in notis*. And see an article by Judge Jackson, American Jurist, Vol. ii., 65, for July, 1829, to the same point.

‡ Warren's Law Studies, first edit., 15 and 16, *in notis*.

species of property—advowson—which never existed among us, is wholly a stranger to American jurisprudence.

There is still another form of action—*Waste*—by which the possession of real estate is sometimes changed, and which may, perhaps, strictly belong to this division of the subject; but I have thought that it might be more conveniently and appropriately discussed under the head of trespasses, nuisances, and other interferences with the occupation or enjoyment of real property.

The actions above named are the usual modes of procedure with us, by which the possession of real estate is now altered. It is necessary briefly to allude to the general principles regulating damages in real actions as they once existed, but the weeping changes which have been effected in the original structure of English jurisprudence, will make this discussion a very cursory one, and we shall then examine the law in regard to the substitutes which have now taken their places—ejectment and dower.

In real actions, properly speaking, damages were not originally given at common law;\* “for it is of the essence of a real action, that only a real thing can be recovered therein; whenever damages, which are a pecuniary recompense, and consequently a personal thing, are recoverable in the same action, the action becomes mixed.”†

By the statutes of Merton, Marlbridge and Gloucester, however,‡ damages were given in the principal real actions. In

\* Sayer on Damages, 5.

† Blackstone says, that in the *assise of novel disseisin*, if the recognitors find the seisin and disseisin, the demandant shall recover his seisin and damages for the injury sustained, “being the only case in which damages were recoverable in any possessory action at the common law, the tenant being in all other cases allowed to retain the intermediate profits of the land to enable him to perform the feudal services.”—*Com., Book III., Ch. 10, 187 and 188.*

So in Pilfold's case, Rep. X., 115, it is said, “in personal actions they shall declare to damage, because they shall recover damages only for the wrong done before the writ brought, and shall recover no damages for any done pending the writ; but in real actions the demandant shall never count to damages, because he is to recover damages pending the writ. \* \* \* At the common law, before the statute of Gloucester, (Anno. 6, E. I., c. I.,) a man should not recover damages in any real action, as in dower before the statute of Merton, c. I., nor in Aiel, Mordancestor before the said statute of Gloucester, but in actions mixed, as in assize, entry in the nature of assize or in personal actions, as trespass *quare clausum fregit*, of goods taken away, &c.” See, also, Roscoe on Real Actions, I., 307.

‡ 20 Hen., III., c. 8. 52 Hen., III., c. 16, and 6 Edw., I., Anno 1278.



those actions where no damages were directly given, and in which, pending the suit, the defendant might impair the value of the property, the ancient writ of *estrepement*\* gave indirect relief. It lay properly in real actions, where the plaintiff could not recover damages by his suit, and, as it were, supplied damages.†

In regard to property in advowsons, it may be briefly noticed that no damages were recoverable at the common law in an assize of *darrein presentment*, nor in an action of *quare impedit*.‡ And the action of *darrein presentment* was abolished in England by the statute of limitation of actions, to which we have already referred. By the statute of 2 West., c. 5, it was provided, in writs of *quare impedit* and *darrein presentment*, if a disturbance of six months took place, that damage should be awarded to two years' value of the church; if six months did not pass, but the presentment were *deraigned*, (i. e., proved) within that time, damages should be awarded to half a year's value of the church. If a more particular view of this branch of our subject is desired by the student, he will find it in those English treatises which are devoted to this particular matter. The scope of this work does not allow a further examination of it.

We come, then, to consider the law of damages in the actions relating to real property, as in general application in the Union; and first, of *Ejectment*.

"Whilst the action of ejectment remained in its original state,§ and the ancient practice prevailed, the measure of damages given by the jury when the plaintiff recovered his term were the profits of the land accruing during the tortious holding of the defendant. But as upon the introduction of the

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\* *Estrepamentum*—from the Fr. *estropier*—*mutilare*.

† *Termes de la ley, in voc.*; Tomlin's Law Dictionary *in voc.* In New York, by Rev. Stat., Vol. II., 260, 2d edit., § 18, the benefit of this writ is given by a provision which, where an action is brought for the recovery of land, or the possession thereof, authorizes the court in which the suit is pending, to make an order restraining the defendant from the commission of waste.

‡ Sayer, 85.

§ Adams on Ejectment, by Tillinghaast, 379. "Before the time of Henry VII.," said Wilmot, C. J., in *Goodtitle vs. Tombs*, 8 Wils., 118, "plaintiffs in ejectment did not recover the term, but until about that time the meane profits were the measure of damages. \* \* \* By the old law and practice, in an action of ejectment, as I before said, you recovered nothing but damages, the measure whereof was the meane profits."

modern system, the proceedings became altogether fictitious, and the plaintiff merely nominal, the damages assessed became nominal also, and they have not, since that time, included the injury sustained by the claimant from the loss of his possession."

And thus it has been decided in New York,\* that a recovery of nominal damages in the action of ejectment is no bar to an action for the mesne profits, and that it is unnecessary to enter a *remittitur damna*.†

In Pennsylvania, it has been decided that the damages in ejectment, being merely nominal, a verdict, finding for the plaintiff without assessing damages, is not thereby vitiated;‡ and the same would probably be the rule in New York.

In some of the States, the course of proceedings is, however, to recover the mesne profits in the action of ejectment, or in an action of trespass to try the title; and in those states the rules that we shall proceed to give, in regard to the action of trespass for mesne profits, will, it is to be supposed, govern in the ejectment suit, or in the action of trespass.§

\* *Van Alen vs. Rogers*, 1 J. Cas., 281.

† In the same state, by a statutory provision, (Rev. Stat., II., 231, 2d edit., § 6,) the real plaintiff is now obliged to bring the suit against a real defendant; but the damages are still merely nominal, subject to the exception hereafter noticed. The seventh section of the same statute requires the plaintiff to aver, in his declaration, that the defendant "unlawfully withholds from the plaintiff the possession of the premises, to his damage, any nominal sum the plaintiff shall think proper to state." In Pennsylvania, a plaintiff in ejectment, under the Acts of 1806 and 1807, may recover damages and costs, although he has conveyed the title to a third person, pending the suit. — *Murray vs. Garretson*, 4 S. & R., 180.

The New York statute (Revised Statutes, II., 2d edit., 236, sec. 44, et seq.,) has also prescribed the mode of recovering mesne profits, by a suggestion on the record, the action of trespass for mesne profits, as we shall see hereafter, being retained where the defendant in the ejectment suit is a tenant or mere occupant, claiming title under some other person, who defends the suit in his name. See *Leland vs. Toumey*, 6 Hill, 328. The Code has made little change in regard to Ejectment. *Rogers vs. Wing*, 5 Pr. R., 50.

‡ *Harvey vs. Snow*, 1 Yeates' Rep., 156. *Gough's Lessee vs. Rinehart*, cited 1 Yeates' Rep., 157.

§ *Starr vs. Pease*, 8 Conn. R., 541. So in Pennsylvania, if the plaintiff chooses to proceed for mesne profits in ejectment at common law, he may do so on giving notice to the defendant of his intentions. *Battin vs. Bigelow*, 1 Peters' C. C. Rep., 452. The mesne profits may be recovered in ejectment at common law in some of the state courts, by way of damages; see *Boyd's Lessee vs. Cowan*, 4 Dall., 138; and *Dixon's Lessee vs. Hosack*, *Thorpe vs. Bell*, *Yeates vs. Stewart*, cited S. C. In this case the practice of blending the two actions is ably vindicated by McKean, C. J. He says, "I shall now briefly consider the *argumentum ab inconvenienti* which refers but to a single in-

The only case in which actual damages can be recovered in the ejectment suit itself is that where the plaintiff's title expires pending the action.

So in New York,\* where the plaintiff's life estate had ter-

stance, to wit, the difficulty the jury may labor under in deciding on the titles of the parties to the possession, and at the same time, in fixing the value of the mesne profits if the verdict shall be for the plaintiff. There can be no great hardship in this. In actions of waste, dowry, assize, and all others where the thing itself, as well as the damages is recovered, the jury are liable to the same inconvenience, nor can I perceive any great perplexity that can arise in determining the rent or annual value of a house or parcel of land, where complete evidence is given of it. It appears to me that the inconvenience or hardship is the other way. After a person has been unlawfully kept out of his house or land for a series of years, and undergone great trouble and expense in recovering a judgment for them, to give him the possession merely, without any satisfaction for the use and occupation pending the action, does not seem to be complete justice. To tell him 'you must sue for the mesne profits in a new action, fee counsel, attend the courts, produce witnesses, and have a new trial for the sole purpose of fixing their value,' is certainly imposing an improper burthen upon him if justice can be had in a more speedy, cheap and easy way. Taking a verdict for the amount of the mesne profits as well as on the title in the ejectment, will prevent this circuity, delay and expense, and I believe it to be equally beneficial for the defendant; for if on the trial he shows a reasonable ground for controverting the plaintiff's claim, or a specious title in himself, a jury would be inclined to give but very moderate damages against him, (of which the jury in the action for the mesne profits can have no consideration, as the title cannot in that action be again gone into,) and he would certainly be saved the costs and expenses of the second suit." See, also, *Joan et al. vs. Shield's Lessee*, 3 Har. & M'H. R., 7; *Gore's Lessee vs. Worthington*, 3 Har. & M'H. 96; *Little vs. Meacham*, 1 Tyler's Rep., 488; *Longstreet vs. Ketchum*, 1 Cox's Rep., 170. In *Denn ex dem., Delatouche vs. Chubb*, 1 Cox's Rep., 466, (New Jersey,) it was ruled in ejectment that the mesne profits might be recovered, and that in assessing them the jury might include all the plaintiff's reasonable and necessary expenses, such as a fee to counsel. An action of trespass is a proper mode of recovering mesne profits after a recovery in ejectment in Pennsylvania, under the acts of 21st March, 1806, and 18th April, 1807. *Osbourne vs. Osbourne*, 11 Serg. & R., 55. In Vermont, also, the two actions have been blended. *Walker vs. Hitchcock*, 19 Verm., 684; *Beach vs. Beach*, 20 Verm., 88; *Edgerton vs. Clark*, 20 Verm., 264. The object of the action of ejectment, in that State, is not merely to recover possession, but also to settle the title and establish the right of property. *Marvin vs. Dennison*, 20 Verm., 662. But in such action of ejectment the plaintiff cannot, with a view to increase his claim for mesne profits, give evidence of wanton acts of trespass, injuring the intrinsic value of the premises. *Walker vs. Hitchcock*, 19 Verm., 684. In Alabama the action of trespass to try titles has been substituted for the actions of ejectment and trespass for mesne profits, and performs the office of both; and as in the action for mesne profits, the plaintiff is entitled to recover the damages he has sustained by being kept out of possession; and these are never increased or diminished by the profits acquired by the defendant from his occupancy. *Bullock vs. Wilson*, 3 Porter's Rep., 332. So in South Carolina, the mesne profits are recoverable in an action of trespass to try titles, and after that action is had no separate action lies for the recovery of mesne profits. *Sumter vs. Lehre*, 1 Treadway's Com. Rep., 102. In Massachusetts, by statute it is provided, that if the defendant recovers judgment in a writ of entry, he shall also, in the same action, recover damages for the rents and profits of the premises. Rev. St., ch. 101, § 14. *Washington Bank vs. Brown*, 2 Met., 293.

\* *Jackson ex dem. Henderson vs. Davenport*, 18 J. R., 295 and 302. This was

minated before trial, the Supreme Court said: "The plaintiff has no title to turn the defendant out of possession, but he has a title to the mesne profits and costs of this suit, and must, therefore, have judgment to enable him to recover them."\*

So in South Carolina, in the action of trespass to try titles, "if a term expire pending an action, the party shall not have possession, but he may have damages."†

In regard to improvements made on the land while out of the possession of the rightful owner, the general principle of the English law as well as our own is, that the owner recovers his land in ejectment without being subjected to the condition of paying for improvements which may have been made upon it by any intruder, or occupant without title. The improvements are considered as annexed to the freehold, and pass with the recovery. Every possessor makes such improvements at his peril, and whether acting on an honest belief in his title, or without color of right, the party who is ousted loses all benefit of his expenditures.‡

The civil law, however, as we shall see, draws a clear line of distinction between the possessor *bonæ fidei* and *malæ fidei*, and the latter only loses the benefit of his improvements. This, too, is the case in Louisiana.§

And this distinction has been introduced, to a certain extent,

before the revision of the statutes; the case is now covered by the statutory provision which enacts, (Rev. Stat., Vol. II., 284, 2d edit., § 81,) "If the right or title of a plaintiff in ejectment expire after the commencement of a suit, but before trial, the verdict shall be returned according to the fact, and judgment shall be entered that he recover his damages by reason of the withholding of the premises by the defendant, to be assessed, and that as to the premises claimed, the defendant go thereof without day."

\* *Wilkes vs. Lion*, 2 Cowen, 383, and *Robinson vs. Campbell*, 3 Wheat., 212; and this seems the rule in Pennsylvania; when the term of the plaintiff expires before the trial, although he cannot recover the possession, yet he may proceed for damages for the trespass and for mesne profits; *Brown's Lessee vs. Galloway*, 1 Peters' C. C. Rep., 299. And the English rule is the same. *Runnington on Ejectment*, 404; *England vs. Slade*, 4 T. R., 682, 683; *Co. Litt.*, 285, a; *Doe vs. Buck*, 3 Camp., 447; *Thrustout vs. Grey & al.*, 2 Strange, 1056; *Adams on Ejectment*, 228.

† *Stockdale vs. Young*, 3 Strobhart, 501.

‡ *Kent's Comm.*; *Leo*, 84, Vol. 2, 335.

§ The Civil Code of Louisiana, Art. 500, provides, "If the work has been done by a third person, evicted but not sentenced to make restitution of the fruits, (mesne profits,) because such person possessed *bona fide*, the owner shall not have a right to demand the demolition of the works, but shall have his choice either to reimburse the value of the materials and the price of workmanship, or to reimburse a sum equal to the enhanced value of the soil." See *Stanbrough vs. Barns*, 2 La. Ann. R., 376.

into the rules which govern the subject of mesne profits. To this head we now turn.

As only nominal damages were given in ejectment, it was necessary to provide another remedy for the claimant for the injury sustained by him from the loss of his possession, and this was effected by a new application of the common action of trespass *vi et armis*, generally termed an action for mesne profits, in which action the plaintiff complains of his ouster and loss of possession, states the time during which the defendant (the beneficial occupant) held the lands, and took the rents and profits, and prays judgment for the damages which he, as rightful owner, has thereby sustained.\*

According to the division adopted in this treatise, the subject of mesne profits, as it does not concern the recovery of real property, would fall under the head of trespass, but as this action is directly auxiliary or subsidiary to that of ejectment, and in many States of the Union actually blended with it, it seems properly to be introduced here.

The mesne or intermediate profits of lands are those received while the property is withheld from its rightful occupant, and when he recovers possession, the right to the mesne profits follows his recovery.

By the Roman law, the *bona fide* possessor of land, held without title, was not liable to the legitimate owner for the *fructus* or mesne profits. "*Si quis a non domino quem dominum esse crediderit, bona fide fundum emerit, vel ex donatione, aliave qualibet justa causa, aequus bona fide acceperit, naturali rationi placuit fructus quos percepit ejus esse pro cultura et cura. Et ideo, si postea dominus supervenerit et fundum vindicet, de fructibus ab eo consumptis agere non potest.*"† This is also the rule of the Scotch,‡ and of the French system ;§ and

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\* Adams on Ejectment, by Tillinghast, Ch. XIV., 879-80.

† Instit. de Rer. Divisione, Lib. II., Tit. 1, Sec. 85.

‡ Kaim's Equity, Book III., Ch. I.

§ Domat I., 272, Book III., Tit. v., § 8. There were, however, before the Revolution, several exceptions to the general principle in France, which will be found noticed by Toullier, in his admirable work, vol. iv., 827, Liv. III., tit. i., ch. iv., § 807, et seq. The matter has been put at rest by the Code Napoleon, which declares, Art. 549, "The occupant makes the mesne profits his own only in case he is a *bona fide* possessor; if otherwise, he must return the profits with the thing itself to the true owner. The occupant is regarded as a *bona fide* possessor when he holds as proprietor

the same principle prevails in Louisiana, the jurisprudence of which State has been largely affected by the liberal reasoning and enlightened equity of the civil law.\* But the common law makes no such distinction, except as we shall now see with regard to improvements put on the premises; it looks only to the strict legal title, and the right to recover the mesne profits follows in all cases upon a recovery in ejectment.† The rule of damages in this ancillary action we have now to consider. And the remarks which we shall make, and the authorities cited, will apply to the action for trespass to try titles in those states where by statute this remedy has been made to assume the functions of the former actions of ejectment and trespass for mesne profits, and also to the action of ejectment in those States where the plaintiff is allowed to recover the rents and profits in that proceeding.

In an action for mesne profits, the plaintiff, as a general rule, recovers the annual value of the land from the time of the accruing of his title, or from the time of such title accrued as laid in the declaration in the ejectment suit, if he relies on the record in that suit to establish his recovery. But, "The jury are not confined in their verdict to the mere rent of the premises, but may give such extra damages as they think the particular circumstances of the case demand."‡ So in an early case in England, it was said,§ "The plaintiff is not confined in this case to the very mesne profits only, but he may recover for his trouble. I have known four times the value of the

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under a derivative title, of the defect of which he is ignorant. The occupant ceases to be so regarded as soon as the defect of title is known to him."

"Le simple possesseur ne fait les fruits aliens que dans le cas où il possède de bonne foi; dans le cas contraire il est tenu de rendre les produits avec la chose au propriétaire qui la revendique. Le possesseur est de bonne foi quand il possède comme propriétaire en vertu d'un titre translatif de propriété dont il ignore les vices. Il cesse d'être de bonne foi du moment où ces vices lui sont connus."

\* The Civil Code of Louisiana asserts, Art. 494, "The produce of the thing does not belong to the simple possessor, and must be returned with the thing to the owner who claims the same, unless the possessor hold it *bona fide*. Art. 495: "He is a *bona fide* possessor who possesses as owner by virtue of an act sufficient in terms to transfer property, the defects of which he was ignorant of; he ceases to be a *bona fide* possessor from the moment these defects are made known to him, or are declared to him by a suit instituted for the recovery of the same by the proprietor."

† Green *vs.* Biddle, 8 Wheat., 1 and 80. In North Carolina, see Camp *vs.* Homealey, 11 Iredell, 212.

‡ Adams on Ejectment, 391.

§ Goodtitle *vs.* Tombs, 8 Wils., 113.

mesne profits given by a jury in this sort of action of trespass ; if it were not so, sometimes complete justice could not be done to the party injured."

So where\* an action of trespass for mesne profits was brought, and bankruptcy was pleaded. On demurrer it was admitted that bankruptcy was no bar to demands for torts in general, but it was insisted that the claim here was in substance for the annual value of the land. But judgment was given for the plaintiff, Lord Mansfield saying, "the plaintiff goes for the whole damages occasioned by the tort;" and Mr. J. Buller said, "the damages here are as uncertain as in an action of assault."

"There are certainly some cases," says Mr. Runnington,† "in which the jury are not bound by the amount of the rent, but may give extra damages, and after judgment by default, the costs in ejectment are recoverable, and are therefore usually declared for as damages in the action for mesne profits." And so the Supreme Court of New York.‡ "The damages in the action for mesne profits, are not limited to the rent. Extra damages may be given." "As to the amount of damages," said Washington, J., on the Pennsylvania Circuit,§ the jury are the only proper judges ; there is no general rule, and the quantum depends on the circumstances of the case."

And so in Pennsylvania, the jury were told at *nisi prius*, that they might give interest from the time of the commencement of the suit ; and on motion for a new trial, the Court said, "As to the measure of the damages, the Court gave in this respect as favorable a construction as the case could possibly admit of. It would not have been error in the Court to have left it to the discretion of the jury to have allowed the plaintiff more than interest upon the amount of the mesne profits. The jury are not confined in their verdict to the mere rent of the premises, although the action is said to be brought to recover the rents and profits of the estate, but may give such extra damages as they may think the particular circumstances of the case demand.]"

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\* *Goodtitle vs. North, Doug., 584.*

† *Ejectment, 489.*

‡ *Dewey vs. Osborne, 4 Cowen, 829.*

§ *Brown's Lessee vs. Galloway, Peters C. C. R., 292.*

| *Drexel vs. Shaw, 2 Barr. State Rep., 271, 276.*

These *dicta* are evidently very loose, and in Pennsylvania an effort has been made to lay down something like a clear rule. So where the judge charged, that the plaintiff might recover the value of the property with interest, together with the costs and expenses of prosecuting the claim, and such other damages as the jury might think the plaintiff entitled to recover, the verdict was set aside.\*

As a general rule, however, it may be said that the actual annual value of the property, together with the costs of the ejectment suit, will furnish the measure of damages. "The action for mesne profits, though in form it is an action of trespass, in effect, is to recover the rent,"† said Ashurst, J. And in New York,‡ interest has been allowed upon the rents. The court said, "as rents in the City of New York, where the premises are situated, are payable at the usual quarter days, (1 R. S., p. 736,) we think the referees in ascertaining the value of the mesne profits, were warranted in adding to the amount of rent, the interest quarterly. So much the plaintiff has lost, and the defendant enjoyed by means of the wrongful possession."

And the costs of the ejectment suit are also recoverable in this action.§ But where the ejectment suit has been defended, and the plaintiff's costs taxed, he cannot recover beyond those taxed costs.|| So in the King's Bench,¶ the plaintiff was allowed to recover by way of damages, the costs incurred by him in a court of error in reversing a judgment in ejectment obtained in the first place by the defendant; and Lord Tenterden said: "There can be no doubt that the court of error could not award costs to the plaintiff. But the expenses incurred in the court of error were part of the damages sustained by the plaintiff, and I think that the jury might reasonably consider the costs between attorney and client, as the measure of the damages which he had sustained."\*\*\*

The same rule as to allowing the costs of the ejectment

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\* *Alexander vs. Herr*, 11 Penn., 587; *Good vs. Mylin*, 8 Barr., 51.

† *Utterson vs. Vernon*, 8 T. R., 589-547.

‡ *Jackson ex dem. Genet vs. Wood*, 24 Wendell, 448.

§ *Aslin vs. Parkin*, 2 Burr., 665. Sayer, 88.

| *Doe vs. Davis*, 1 Esp. R., 856, and *Brooke vs. Bridges*, 7 J. B. Moore, 471. *Doe vs. Filliter*, 18 Mees. & Wels., 47.

¶ *Nowell vs. Roake*, 7 B. & Cres., 404.

\*\*\* See, also, *Symonds vs. Page*, 1 Cr. & J., 29, and *Doe vs. Hare*, 2 Dowl. P. C., 245.



which was laid down by Lord Mansfield, has been declared in New York.\* But in a case where the costs were not included in the verdict, the Court of King's Bench refused to assist the plaintiff.†

Where a recovery in ejectment is effected on the demises of two only, out of several tenants, and suit is afterwards brought for mesne profits, none but the shares of the meane profits to which those two tenants are entitled, can be recovered.‡

When, on the other hand, we come to consider the limitations of relief in this proceeding, we find it every where held to be a liberal and equitable action, and one which will allow of every equitable kind of defence.§

Among the most important considerations that a defendant can urge, in answer to the claim for the rents and profits received by him, is that which the common law has, to a certain extent, adopted from the civil law, and which grows out of permanent improvements made by him upon the premises during his occupancy. We have already seen the lenity with which the civil law treated the occupant in good faith, and the reasoning of the civilians has so far obtained in the tribunals of our law that a *bona fide* occupant of lands is allowed to mitigate the damages in the action brought by the rightful owner, by offsetting the value of his permanent improvements made in good faith to the extent of the rents and profits claimed. This principle has been fully declared by the Supreme Court of the United States,|| in a case in which the distinction between a possessor *bonæ fidei* and *malæ fidei* was distinctly recognized, the former being one who not only supposes himself to be the true proprietor of the land, but who is ignorant that his title is contested by any person claiming a better right to it.¶

In a later case,\*\* the Supreme Court of the State of New York went still farther, and allowed improvements made after

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\* *Baron vs. Abeel*, 8 J. R., 481.

† *Gulliver vs. Drinkwater*, 2 T. R., 261.

‡ *Holdfast vs. Shepherd*, 9 Iredell (N. C.), 222.

§ *Murray vs. Gouverneur*, 2 J. Cas., 488.

|| *Green vs. Biddle*, 8 Wheaton, 1.

¶ See, also, to this same point, *Bright vs. Boyd*, 1 Story's Rep., 479.

\*\* *Jackson vs. Loomis*, 4 Cow., 168.

suit brought by the legal owner, and during its pendency, to be given in evidence for the purpose of mitigating damages. The distinction between improvements made before and after notice of suit brought, does not, however, appear to have been clearly taken, and the court rely on the case above cited in the Supreme Court of the United States, where the point was not even raised.

In a case in Pennsylvania,\* the general principle has been recognised, but Washington, J., charged the jury that, as the plaintiff, having proved no title prior to the time of the devise in the ejectment suit, could recover damages only subsequent to that period, the value of the defendant's improvements ought first to be set off against the mesne profits received by him prior to that time, and after the plaintiff's title accrued, the balance to be deducted from the rents and profits to which the plaintiff was entitled subsequent to the devise. The case does not seem clear, because it is expressly stated that the plaintiff had proved no title except under the ejectment recovery, and yet some other period is spoken of as that when the plaintiff's title accrued.†

As to the time for which the defendant is liable, each occu-

\* *Hylton vs. Brown*, 2 Wash. C. C. R., 165.

† In the ancient real actions, the improvements of the tenant appear to have always been the subject of set-off or recoupment.

"Damage of 40s. and no more was found by the assize, because the land sown and the house wall amended, and so recouped the damage." *Viner's Abr.*, tit. Discount, where see many other cases in the same connection. See, also, *Coulter's Case*, (5 Co., 80,) and *Bro.*, tit. *Damages*. Lord Kaimes says, Book III., ch. i., 276, "It is a maxim suggested by nature, that reparations and meliorations bestowed upon a house or upon land, ought to be defrayed out of the rents;" and so says the Roman law. "*Sumptus in prædium quod alienum esse apparuit, a bona fide possessore facti, neque ab eo qui prædium donavit, neque a domino peti possunt, verum exceptione doti posita, per officium judicis æquitatis ratione servantur, scilicet si fructuum ante litem contestatam perceptorum summam excedunt. Etenim, admittens compensationem, superfluum sumptuum meliore prædio facto dominus restituere cogitur.*"—L. 48, de Rei Vindicatione.

All this, however, applies to the case of a *bona fide* possessor or one without notice, and does not touch that of a person who being apprised of a claim of better title and with full notice, and even after suit brought, goes on to apply the mesne profits to permanent improvements. It seems very dangerous to make a compulsory allowance for such an application of funds to property which the defendant is fully apprized will be claimed by another. Such expenditures should be made, it would seem, at the occupant's peril.

In Kentucky the occupant is allowed for lasting and valuable improvements. *Oldham vs. Woods*, 8 Monroe, 47.

In Ohio, in trespass for mesne profits, as a general rule, valuable and lasting improvements may be set-off against rents.—*Worthington vs. Young*, 8 Ohio, 401.

pant is answerable for the time he has been in possession.\* This right, however, extends back for only six years, if the statute of limitations be pleaded.†

It is plain that the measure of compensation, which we are now considering, has been involved in confusion by the technical character of our forms of action. "The *dicta* on the subject," says Gibson, C. J., in Pennsylvania, "seem to have been predicated by judges who had no precise idea of it, for they have not defined it by any land marks."‡ The action of trespass being one of *tort*, admits of any evidence in aggravation, and, therefore, in one sense, it is correct to say that the damages in this proceeding are entirely at large and under the control of the jury. But, on the other hand, there is nothing necessarily in the action of the nature of a trespass. The property may have been withheld, and the rents received in entire good faith. In this case the allegations of force, &c., are purely fictitious, and it certainly never would be tolerated on such facts that the jury should give any damages beyond the actual value of the income.

It may then be said, as long as the technical form of action is maintained, that where circumstances of malicious aggravation are proved, such, for instance, as a wilful holding for the purpose of oppression, the jury may give vindictive or exemplary damages, but that, where no such facts are shown, they are limited to the actual annual value of the property, with interest thereon, and the costs of the ejectment suit.

\* Holcomb *vs.* Rawlins, Cro. Eliz., 540. Morgan *vs.* Varick, 8 Wendell, 587.

† Bull. N. P., 568. Saund. Pleading and Ev., 668. But the Revised Statutes of New York have done away the necessity of pleading this statute.

By the Revised Statutes of New York, Vol. 2, 286, it is declared, that instead of the action for mesne profits heretofore used, the plaintiff seeking to recover such damages shall, within one year after docketing his judgment, make and file a suggestion of the claim, and the recovery is limited to six years, whether the statute of limitations be pleaded or not.—*Jackson ex dem. vs. Wood*, 24 Wend., 443.

This provision, however, has been declared not to abolish the action of trespass for mesne profits except as against the defendant in the ejectment suit, and wherever the defendant is a merely nominal party, or if it is necessary to join others, or if possession is obtained without suit or judgment, the old action of trespass must still be resorted to. *Leland vs. Tousey*, 6 Hill, 328.

As to the rule of damages in this action in New Jersey, see *Denn vs. Chubb*, 1 Cox, 464. In Pennsylvania, *Huston vs. Wickersham*, 2 Watts & Serg., 308; and in Maryland, *Gill vs. Cole*, 1 Har. & J., 408.

‡ *Alexander vs. Herr*, 11 Penn. Rep., 537.

We come now to the subject of *Dower*.

Where the husband of a woman is seized of an estate of inheritance and dies, the wife shall have the third part of all the lands and tenements whereof he was seized at any time during the coverture, to hold for the term of her natural life.\*

"A dowress," says Mr. Park,† "having no right of entry till her dower is assigned, cannot, if an assignment is refused, maintain a possessory action." In England the legal remedy to enforce an assignment of dower is by a writ of dower, *unde nihil habet*, or by a writ of right of dower, upon which, if she obtains judgment, dower is assigned and ejectment may then be brought. In consequence, however, of the jurisdiction assumed by courts of equity in regard to setting out dower, the prosecution of a writ of dower has become very unusual, except where it is ordered by Chancery to try a disputed title.‡

"Dower being a real action," says Mr. Park,§ "no damages were at the common law recoverable for its detention." "No damages," says Mr. Sayer,|| "are recoverable either at the common law or under any statute in an action of right of dower." But in the action of dower *unde nihil habet*, damages were given by the Statute of Merton. This act gave damages to widows who *could not have their dower without plea*. A previous demand was, therefore, necessary, and, in an action¶ under this statute, where the jury upon a writ of inquiry assessed damages to the amount of the third part of the value of the land, from the death of the husband to the day of the inquisition, without making deductions for land tax, repairs or chief rents, the inquisition was set aside on the two grounds, that these deductions should have been made, and that the damages should only have been assessed to the day of awarding the writ of inquiry; but on this latter point there are conflict-

\* Black. Com., Book II., ch. 8, § iv., 129.

† A Treatise on the Law of Dower, by John James Park, London, 238.

‡ The writ of right of dower is of rare occurrence, if not entirely unknown in this country; and the learned author of the Treatise on Pleading and Practice in Real Actions, says that he never knew any such action brought in Massachusetts. Stearn's Real Actions, 307. Kent's Com., Vol. iv., 63.

§ Park on Dower, 301.

|| Ch. 6, 23.

¶ Penrice vs. Penrice, 2 Barn., 131.

ing decisions, and the contrary rule seems now to be established.\*

It appears that by damages under this statute are to be understood the net profits of the third part of the land subsequent to the death of the husband or the teste of the original, after deducting outgoings. So, if the lands are leased for years before marriage, the wife will recover dower not according to the value of the land, but according to the rents, and it follows that if the rent reserved was nominal, no damages, or none but nominal damages, can be recovered.†

On a plea of *tout temps prist* to a declaration in dower under the statute of Merton, replication of a demand and refusal to render dower before the writ, rejoinder traversing the demand, and issue thereon found for the demandant, the demandant is entitled to damages from the death of her husband, and not from the date of the demand only.‡

Many other cases have been decided on the statute of Merton, which will be found in Mr. Park's valuable treatise above cited; but equity having, as already said, obtained a very extensive control over the subject of dower, it does not appear necessary to do more than to refer to a repository of the authorities which appertain to this branch of the law.§

In New York, the action of ejectment was early substituted for the former legal remedies for the recovery of dower, writs of dower being formally abolished;|| and, in this action, it is provided, by statute, that "wherever the wife recovers dower in lands of which her husband shall have died seized, she shall be entitled also to recover damages for the withholding of such dower. Such damages shall be one-third part of the annual value of the mesne profits of the lands in which she shall so recover her dower, to be estimated in a suit against the heirs of her husband from the time of his death; and, in suits against other persons from the time of her demanding her dower of

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\* *Pilford's Case*, 10 Rep., 117. *Walker vs. Nevil*, 1 Leon., 56. *Park on Dower*, 308, and cases there cited.

† *Hilchins vs. Hilchins*, 2 Vern., 408.

‡ *Watson vs. Watson*, 20 Law J. Rep., (N. S.) C. P., 25. Eng. L. & E. R., 871.

§ In South Carolina and Ohio, no damages are allowed in a judgment of dower, and the rule prescribed in the statute of Merton is not adopted nor followed. *Heyward vs. Cuthbert*, 1 McCord's R., 386; *Bank U. S. vs. Dunsmuth*, 10 Ohio Rep., 13.

|| 2 R. S., 848, § 24. 2 R. S., 804, § 2.

such persons ; and in all cases to be estimated to the time of recovering judgment for such damages, but not to exceed six years in the whole in any case."\* Such damages are not to be estimated, however, for the use of any permanent improvements made after the death of the husband by his heirs, or by other persons claiming title.†

And it is further enacted, that where dower is recovered in lands that have been aliened by the heir, the wife shall be entitled, in an action on the case, against the heir, to recover her damages for withholding the dower from the time of the husband's death to the time of the alienation, not exceeding six years in all, and any damages so recovered against the heir, or in the dower suit against the heir's grantee, are to be respectively deducted from each other.‡ The provision which gives damages from the time of the husband's death, is an affirmation of the doctrine laid down by the Supreme Court of New York in an early case.§

In a somewhat recent case,|| the construction of this Statute was settled ; and it was held that where lands were aliened by the husband, the value was to be computed as at the time of the alienation, and no more ; and it was further held, that when the widow brings ejectment for dower, although before admeasurement, she is entitled to costs.¶

On this point, independently of any statutory provision, some perplexity exists, and the greatest authorities of American law, Chancellor Kent and Mr. Justice Story, are divided. The authorities, both English and American, have been fully exam-

\* 1 R. S., 742 and 743, § 19 and 20.

† Sec. 21.

‡ 2 R. S., 743, § 22. In Virginia, the widow recovers damages against an alienee so far forth as profits are concerned, only from the date of the subpoena, *Tod vs. Baylor*, 4 Leigh's R., 498. In Maryland, from the time of the demand and refusal to assign; *Steiger's Adm. vs. Hillen*, 5 Gill. & Johnson, 121. In New Jersey, see *Woodruff vs. Brown*, 2 Harrison's N. J. Rep., 246.

§ *Hitchcock vs. Harrington*, 6 J. R., 290. See, also, *Jackson ex dem. Clark vs. O'Donaghy*, 7 J. R., 247. *Humphrey vs. Phinney*, 2 J. R., 484. *Dorchester vs. Coventry*, 11 J. R., 510. *Dolf vs. Basset*, 15 J. R., 21. *Shaw vs. White*, 18 J. R., 179. *Coates vs. Cheever*, 1 Cow., 460.

|| *Walker vs. Schuyler*, 10 Wend., 480.

¶ In Massachusetts, see on this subject, Rev. Stat., tit. Dower, and *Leonard vs. Leonard*, 4 Mass., 583. *Miller vs. Miller*, 12 Mass., 454. *Conner vs. Shepherd*, 15 Mass., 163, 167. *Ayer vs. Spring*, 10 Mass., 80. *Perry vs. Goodwin*, 6 Mass., 498, 499. *Leavitt vs. Lamprey*, 18 Pick., 332. *Stearns vs. Swift*, 8 Pick., 532.

ined by Mr. Justice Story, on the Massachusetts circuit,\* and the result arrived at by him is, that when the heir builds on or otherwise improves the estate, the widow shall have her dower of the improvements, otherwise as against a purchaser; but that, as against the latter, the dowress is to have the benefit of any enhanced value of the land between the alienation and the assignment of dower, arising from the general progress and population of the country. So, if the land has depreciated, she sustains the loss.†

On the other hand, Mr. Chancellor Kent has critically examined the subject in his Commentaries, and declares it to be the ancient and settled rule of the common law, that the widow takes her dower according to the value of the land at the time of the alienation, and not according to its subsequent or improved value, though he assented as to the right of the dowress to be allowed for increased value, arising from extrinsic or general causes.‡

In this conflict of authorities, it becomes me only to state the doubt as it exists.§

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\* Powell and wife *vs.* Monson & Brimfield's Manufacturing Co., 3 Mason, 347.

† Leggett *vs.* Steele, 4 Wash. C. C. R., 305. Coke's Littleton, 32 a. Perkins, Dower, § 328, 329. Bacon's Abr. Dower, B. 5. Gilbert's Tenures. Gore *vs.* Brazier, 3 Mass., 523, 534. Leiby *vs.* Swett, Story's Pleadings, 365. Catlin *vs.* Ware, 9 Mass., 218. Ayer *vs.* Spring, 9 Mass., 8. S. C., 10 Mass. R., 80. But in New York the point seems doubtful. Humphrey *vs.* Phinney, 2 J. R., 434. Dorchester *vs.* Coventry, 11 J. R., 510. Shaw *vs.* White, 13 J. R., 179. Hale *vs.* James, 6 J. C. R., 258. Roper, Husband and Wife, ch. 9, § 8, 346, 347. In Pennsylvania and Ohio, Mr. Justice Story's doctrine is upheld. Dunsett *vs.* Bank of the U. S., 6 Ohio R., 76. Thompson *vs.* Morrow, 5 Serg. & Rawle, 289.

‡ Com., Vol. IV., 65.

§ See Tod *vs.* Baylor, 4 Leigh's R., 498, in Virginia, which excludes improvements. Wilson *vs.* Oatman, 2 Blackf. Ind. R., 323. Mahoney *vs.* Young, 3 Dana's Ken. R., 538. Wall *vs.* Hill, 7 Ib., 172. Wooldridge *vs.* Wilkins, 3 Howard's Miss. R., 360.

In Virginia the Act, 1 Rev. Code, Ch. 118, § 1, 468, which authorizes the recovery of damages in writs of right, intends such damages as may be recovered in actions of trespass for meane profits. Purcell *vs.* Wilson, 4 Grattan, 16. See a recent English case, Garrard *vs.* Tuck, 8 Man. Gr. & S., 231, of dower *unde nihil habet*, where it was held that the exact number of acres of land in respect of which dower is demanded is not material in a writ and count in dower. And see the same case as to the effect of outstanding terms, and setting aside and quashing writs of error.

## CHAPTER V.

### MEASURE OF DAMAGES FOR WRONGFUL INTERFERENCE WITH REAL PROPERTY.

The Rule of Damages in actions for wrongful interference with the occupation or enjoyment of Real Estate—Trespass to Real Property—Case—Nuisance—Waste.

WE have already seen,\* when treating of the subject of nominal damages, that every unauthorized entry on the real estate of another, whether actual injury be or be not thereby inflicted, lays the foundation for a claim to at least nominal damages.† So says the Supreme Court of Connecticut, “An injury, legally speaking, consists of a wrong done to a person, or in other words, a violation of his right. For the vindication of every right there is a remedy. When, therefore, there has been a violation of a right, the person injured is entitled to an action. If he is entitled to an action, he is entitled to at least nominal damages, or else he would not be entitled to a recovery. Such damages are given in order to vindicate the right which has been invaded, and such further damages are awarded as are proper to remunerate him for any specific damage which he has sustained. It is on this principle that a person may sustain an action of trespass for an unauthorized entry on his land, although he show no actual specific damage to have thereby accrued to him, and even although the defendant may prove that such act was beneficial to the plaintiff.”‡ And we have also considered the rules of compensation where the possession of real property has been wrongfully withheld. The present division of our subject is consequently reduced to narrow limits.

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\* Supra, Ch. II., 46, et seq. So in *Texas, Carter et al. vs. Wallace*, 2 Texas R., 200.

† So even an entry on the plaintiff's land for the purpose of taking away the defendant's own property, is a technical trespass. *Heermance vs. Vernoy*, 6 J. R., 5. *Blake vs. Jerome*, 14 J. R., 406. But it has been held otherwise in Pennsylvania, if the chattel was wrongfully taken away. *Chambers vs. Bedell*, 2 Watts & S., 225.

‡ *Parker vs. Griswold*, 17 Conn., 238.



As a general rule, the remedy for illegal entries upon real estate or interference with its enjoyment, is either by an action of trespass, or trespass on the case, or proceedings as for nuisance; in all these proceedings the rules are analogous, and the measure of damages is the amount of injury directly resulting from the act complained of.

It is well settled in England, and generally in the United States, that to entitle the plaintiff to bring an action of trespass *quare clausum fregit*, possession in fact is indispensable.\* And as against a wrong doer bare possession is sufficient.†

And it results from this same rule, that if the trespass amount to an ouster of the plaintiff, he can recover damages only for the trespass itself or first entry, for though every subsequent wrongful act is a continuance of the trespass, yet to enable the plaintiff to recover damages for these acts there must be a re-entry.‡

It will be borne in mind, in the consideration of the present division of the subject, as we have already had occasion to notice,§ that as the jury in actions of tort are not restrained to the

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\* 8 Wooddeson, 198, 194. *Bedingfield vs. Onslow*, 8 Lev., 209. The general doctrine that trespass *quare clausum fregit* will not lie by lessor out of possession against a stranger for an injury to real property, is well settled in New York. *Campbell vs. Arnold*, 1 J. R., 511. *Stuyvesant vs. Dunham*, 9 J. R., 61. *Wickham vs. Freeman*, 12 J. R., 188. Unless where the plaintiff shows title to lands not in the actual possession of any one; in which case the possession follows the title. *Van Rensselaer vs. Radcliff*, 10 Wendell, 689. *Holmes vs. Seely*, 19 Wend., 507; and so in Massachusetts, *Lienow vs. Ritchie*, 8 Pick., 285. *French vs. Fuller*, 28 Pick., 104. And it is equally well settled in Ohio, *Miller vs. Fuller*, 4 Hammond's Ohio R., 488. And in Kentucky, *Foster vs. Fletcher*, 7 Monroe, 586. *Owings vs. Gibson*, 2 A. K. Marsh, 515. *Carrine vs. Westerfield*, 8 A. K. Marsh, 381. In Texas, also, a lessor cannot maintain an action for a trespass committed on the leased premises while in possession of the tenant; the lessee alone can sue; *Reynolds vs. Williams*, 1 Texas, 311. In the ordinary case of carrying on a farm at the halves, the owner is not so far divested of the possession but that he may maintain trespass for injury to the inheritance; *Cutting vs. Cox*, 19 Verm., 517. And if the plaintiff have the right of property, and of immediate possession, he may maintain trespass though not in actual possession; *Mason vs. Lewis*, 1 Iowa, 494; *Poole vs. Mitchell*, 1 Hill, S. C., 404. In Connecticut, it has been decided that a plaintiff in trespass, having the sole and exclusive possession, may recover against a wrongdoer the whole damage done by him, though the conveyance from some of those under whom he claims was defective; *Curtiss vs. Hoyt*, 19 Conn., 154.

† *Chambers vs. Donaldson*, 11 East, 66; *Graham vs. Peat*, 1 East, 244; *First Parish in Shrewsbury vs. South*, 14 Pick., 297; *Branch vs. Doane*, 18 Conn., 288.

‡ *Holcomb vs. Rowline*, Cro. Eliz., 540. *Monckton vs. Pashley*, 2 Ld. Raym., 974. S. C., 2 Salk., 688. Black. Com., Lib. III., 210. *Case vs. Shepherd*, 2 J. Cases, 27. *Holmes vs. Seely*, 19 Wend., 507; and so in Ohio, *Rowland vs. Rowland*, 8 Ohio R., 40; and in Kentucky, *Shields vs. Henderson*, 1 Lit. Rep., 389.

§ Supra, 88.

amount of the mere pecuniary loss sustained by the plaintiff, he is always at liberty to give in evidence the circumstances which accompany and give character to the trespass.\* And if the act be malicious or oppressive, exemplary damages may therefore, be recovered.† But of this we shall have occasion to speak more fully when we come to consider the rule of damages in regard to torts in general.

We have also seen,‡ that the plaintiff is limited to the immediate consequences of the wrongful act, and that remote damages are not allowed.§ In Maryland, however, in trespass *quare clausum*, the plaintiff has been allowed to give evidence of damage to his crop, occasioned by reason of the defendant driving away his negroes.|| And if the defendant, while a trespasser on the plaintiff's land, commits any other distinct trespass for which a separate action would lie, yet such acts of trespass and their consequences may be alleged and proved in aggravation of damages. Thus in an action for breaking and entering the plaintiff's house, the debauching of his daughter and servant, and the consequential damages to the plaintiff, may be laid in aggravation.¶

So in trespass for the entry of diseased cattle, damage from infection may be stated in aggravation, and so in Connecticut, in an action of trespass *quare clausum fregit*, where the defendant's sheep, while trespassing on the plaintiff's land, mingled with his sheep and communicated to them a dangerous disease of which many died, it was held that the plaintiff might recover for the loss of his sheep as well as the breach of his close, and that the defendant's knowledge of the existence of the disease might properly be considered by the jury in estimating damages.\*\* So spoliation or asportation of trees may be laid as aggravation in this form of proceeding.†† And the value of

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\* Starkie's Evidence, vol. ii., 1114. Trespass. Damages.

† So in Alabama, *Mitchell vs. Billingsley*, 17 Ala., 391.

‡ Supra, 57, et seq.

§ *Loker vs. Damon*, 17 Pick., 284, and supra, 94.

|| *Johnson vs. Courts*, 3 Har. & M'Hen., 510.

¶ Starkie on Evidence, vol. ii., 1114. *Bennett vs. Alcott*, 2 T. R., 166. The rule is the same in Kentucky, *Wright vs. Chandler*, 4 Bibb, 422.

\*\* *Barnum vs. Vandusen*, 16 Conn., 200.

†† *Anderson vs. Buckton*, Strange, 192. Should not the term *aggravation* be limited to acts of malicious insult or injury accompanying the principal transaction?

fruit-bearing trees is to be estimated with reference to what they are worth on the premises in their growing state, and not as taken up and removed from the place.\*

So the value of growing timber is what it was worth at the place where it stood when the trespass was committed, not what it would have been worth if differently situated in other parts of the country.†

And in an action of trespass for entering upon the plaintiff's close, and carrying away the soil, the proper measure of damages has been held by the English court of Exchequer to be the value of the land removed, and not the expense of restoring the premises to their original condition.‡

But where trespass was brought for breaking and entering the plaintiff's dwelling-house and taking and carrying away certain goods and chattels, and converting and disposing of the same to the defendant's use, it not being averred that the chattels belonged to the plaintiff, the judge who tried the cause directed a verdict for the trespass only, and on a motion to increase the damages this was held right.§

Nor will the damages be allowed to be given with any reference to the defendant's wealth or poverty, and if evidence to this point is admitted, the verdict will not be allowed to stand.||

Where a plaintiff had a right of action against defendant for a tortious entry by the latter on his land and committing a nuisance thereon, from which damages ensued, and thereafter a release was given; it was held that this discharge extinguished all right of action not only for the original injury and damages up to the time the release was given, but for all future damages. That if, however, the defendant had placed the nuisance on his own land and the plaintiff's demand was for consequential damage only, a discharge of the plaintiff would not have extinguished the right of action for future damages.¶

We have already seen that where the injury consists in improperly flooding the land of another, the law presumes nomi-

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\* *Mitchell vs. Billingsley*, 17 Ala., 391.

† *Ivey vs. McQueen*, 17 Ala., 408.

‡ *Jones vs. Gooday*, 8 Mees. & Wels., 146.

§ *Pritchard vs. Long*, 9 Mees. & Wels., 666.

|| *Myers vs. Malcolm*, 6 Hill, 293.

¶ *Vedder vs. Vedder*, 1 Denio, 257.

nal damages, even if no actual damage be proved; and so if water be wrongfully diverted from a mill, or a water course be obstructed, nominal damages will, at all events, be awarded.\*

So it is not necessary for the plaintiff in an action for the diversion of a water course to show that he has sustained specific damage thereby; he may recover notwithstanding he has sustained no actual or perceptible injury.†

In Massachusetts, where an action was brought for an injury to the plaintiff's mill, by causing the water to flow back on it, the judge instructed the jury, that, if the plaintiff proved his mill to have sustained any actual perceptible damage in consequence of the defendant's act, he was entitled to recover, but that for a theoretic injury, or damage to be inferred from the obstruction of the water by the defendant's dam, he was not answerable, and on motion for a new trial this was held right.‡

The principle of the common law in cases of this kind, as we shall see hereafter, in regard to nuisances, is that successive actions can be brought as long as the obstruction exists, and in some of the States of the Union an attempt has, therefore, been made to regulate the subject by statute. So, in North Carolina, an act was passed of which the leading feature is to prevent any action being brought against the owner of a mill unless it be first ascertained on petition, by the verdict of a jury, that the annual damage during the time for which the action is to be brought, amounts to the sum of twenty dollars at least.§

Where two or more mills are entitled to a common use of water, the owner of the upper mill must afford the lower mill a fair and reasonable participation in its use. If the injury is trivial the law will not afford redress, but it will interpose to prevent the lower mill being rendered useless or unproductive.¶ And in a case of this nature, the Supreme Court of New York said, that the defendants were liable for the use of the water beyond their relative proportion, and that, in estimating the

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\* *Butman vs. Hussey*, 3 Fairf., 407. *Parker vs. Griswold*, 17 Conn., 288. *Branch vs. Doane*, 18 Conn., 288.

† *Parker vs. Griswold*, 17 Conn., 288. *Bowen vs. Hill*, 1 Bing. N. C., 549.

‡ *Thompson vs. Crooker*, 9 Pick., 59. See an action for flooding lands in Pennsylvania, *Bell vs. Clintock*, 9 Watts, 119.

§ *Gilliam vs. Canaday*, 11 Iredell, 106.

¶ *Wheaton's Selwyn's Nisi Prius*, vol. ii., 1188. *Sackrider vs. Beers*, 10 J. R., 241.

damages, the jury should be governed by this principle ; and the damages were arrived at by a comparison of the tolls upon the number of barrels of flour actually ground by the plaintiff's mill, compared with the number that he might have ground if he had had the use of the water to which he was entitled.\*

In a recent case in the Queen's Bench, where in an action of trespass for entering the plaintiff's close and destroying a mill-dam, the defendant justified the trespass on the ground that he was possessed of a mill, and that a stream of water of right flowed thereto, and that the plaintiff's dam obstructed the flow of water to defendant's mill, it was asked whether the plaintiff sought to recover substantial damages, and his counsel not declaring such to be the case, the Lord Chief Justice said that the action was brought more to try a right than to recover damages, and directed the defendant to begin ; and on motion for a new trial, this was held right.†

In Pennsylvania, where a party proceeded in the common pleas under the act of that State, to obtain the right to enter on land of a third party to make a railroad, and after the value of the land of the plaintiff was fixed upon, but before judgment was given, proceeded to enter, it was held that though this did not excuse the trespass, it took away all pretext for vindictive damages.‡

It is settled that the right of an owner of lands to the enjoyment thereof is qualified by the rights of others. He may pursue any lawful trade, but he cannot create a nuisance to the premises of another. So he may dig a canal, but, in so doing, he has no right to blast rocks so as to cast them upon the premises of a third party. And in such a case, where the plaintiff does not claim exemplary damages, evidence that the work done by the defendant was performed in the best and most careful manner, is irrelevant and inadmissible.§

There is a class of cases properly belonging to this branch of our subject, where actions are brought by reversioners for injuries to their inheritance, the remedy being by an action

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\* *Merritt vs. Brinkerhoff*, 17 J. R., 806. See, also, *Platt vs. Root*, 15 J. R., 213.

† *Chapman vs. Rawson*, April 15, 1846. *Jurist*, vol. x., 387.

‡ *Harvey vs. Thomas*, 10 Watts, 68.

§ *Hay vs. Cohoes Co.*, 2 Comstock, 159. *Tremain vs. Cohoes Co.*, 2 Comstock, 168.

on the case,\* and to these we shall again allude when treating of the subject of waste.† It was at first doubted, whether the reversioner's remedy was not limited to the case of an absolute and permanent diminution of the value of the property, and in an action for erecting a wall, whereby the plaintiff's lights were obstructed, the declaration counting for the plaintiff as reversioner, it was insisted that a temporary nuisance could not be an injury to the inheritance: but the court held otherwise, being of opinion that an action might be brought by the tenant in respect of his possession, and by the landlord or reversioner in respect of his inheritance, for the injury done to the value of it.‡

And it is now well settled that, if the act complained of works any injury to the inheritance, or affects in any way the reversioner's title, the law will remunerate him in damages.§ But as it is evident that injuries of this character are often of a nature very difficult to be estimated, the courts have uniformly exhibited great caution in requiring the fact of damage to the reversionary interest to be clearly established.

Thus it is held that, in actions of this nature, it must be distinctly averred in the declaration, that the act complained of has been done to the damage of the reversion, or must state an injury of such permanent nature as to be necessarily injurious to the reversion; and where a verdict was obtained on a declaration alleging that the defendant had constructed a wall so as to overhang the yard of which the plaintiff was reversioner, and to produce a water drip in the yard, but without alleging any injury to the plaintiff's reversionary estate and interest in the premises, the judgment was arrested by the King's Bench.||

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\* In Massachusetts, it was held, previous to the revision of the statutes of that State, that the owner of real estate in the possession of a lessee, other than at will, could not maintain trespass for an injury to his reversionary interest, and that case was the only remedy; *Lienow vs. Ritchie*, 8 Pick., 285; but if the lessee were at will only, it was held that trespass would lie. Now, however, since the Revised Statutes, C. 60, § 26, requiring three months' notice to be given in order to determine estates at will, this distinction is held to be done away, and case is considered the proper remedy for any injury to the landlord's reversionary interest in estates at will as well as others. *French vs. Fuller*, 28 Pick., 104.

† *Infra*, p. 149.

‡ *Jesser vs. Gifford*, 4 Burr., 2141.

§ *Shadwell vs. Hutchinson*, 8 Car. & Payne, 615. S. C., 4 Car. & Payne, 338.

|| *Jackson vs. Fisher*, 1 Maule & Sel., 234.

But building a roof with eaves, which discharge rain water by a spout into the adjoining premises, is an injury for which the landlord of such premises may recover as reversioner, while they are under demise, if the jury think there is a damage to the reversion.\*

So again, where the defendant being a lessee for years, with out leave opened a door in the house owned by the plaintiff as landlord, and the jury found that the house was not in any way weakened or injured by the act, the court refused to allow a verdict for nominal damages to be entered, and directed a new trial to be had on this point, saying, "We cannot say that the opening of the door in this case affects the evidence of the plaintiff's title. That is a question of fact."† And so a reversioner cannot maintain an action on the case against a stranger for merely entering upon his land held by a tenant on lease, though the entry be made in exercise of an alleged right of way.‡ So again, it has been held that the obstruction of a public navigable river is not a damage to a reversioner out of possession of premises abutting thereon.§

Where the plaintiff was the lessee for years of certain premises at an annual rent, with liberty to dig half an acre of brick earth annually, and covenanted that he would not dig more, or that if he did he would pay an increased rent of £375 per half acre, being after the rate that all the brick earth was sold for, and a stranger dug and took away brick earth; the lessee recovered against him the full value of the earth dug on the ground that the brick earth was by the terms of the lease sold to the lessee, as well as that the tenant would be liable over for the waste to the landlord; and on argument this was held right.||

We come next to the subject of nuisances. A great deal of learning will be found in the books as to the precise nature of a nuisance, and as to what can be so considered and treated. That examination would, however, fall beyond the limits of this treatise. "Whatsoever," says Blackstone,¶ "unlawfully an-

\* *Tucker vs. Newman*, 11 Ad. & Ell., 40.

† *Young vs. Spencer*, 10 Barn. & Cres., 145.

‡ *Baxter vs. Taylor*, 4 Barn. & Adol., 73.

§ *Dobson vs. Blackmore*, 9 Q. B., 991.

|| *Attersoll vs. Stevens*, 1 Taunt., 132.

¶ Book III., Ch. I., 51.

noys or doth damage to another, is a nuisance," and the remedies for private nuisances he declares\* to be "an action on the case for damages, in which damages only are recoverable, and an assize of nuisance by which not only are damages recovered, but the nuisance is itself abated."†

The ancient real action which abated the nuisance, is, as will be readily seen, one peculiar in its character, but the action on the case which simply gives damages for the infringement of the plaintiff's right, falls strictly within the class which we are now considering of disturbances of the enjoyment of real estate, as vindicated in the ordinary actions of trespass or case, and the measure of compensation is to be regulated by the same principles.‡

We have already seen,§ that if the nuisance is so general as to be a common or public nuisance, the remedy is by indictment, not by private suit. But every individual who suffers actual damage from a common nuisance, may maintain an action for his own particular injury, though there may be others equally damnified. It is essential, however, to allege and prove special damage. So it was very early held in England. Thus in an action for stopping up a highway, "All the court agreed that when an action arises from a public nuisance, there must be a special damage, for he that doeth nuisance is punishable at a suit of the public, and to allow all private persons their actions, without special damage, would create an infinite and endless multiplicity of suits."¶

So, too, in this country; "If a person," said the learned Chancellor Walworth, in the Court of Errors in New York,¶

\* Book III., Ch. 18, 220,

† This latter remedy has been in New York retained and simplified, (Kent's Commentaries, vol. iv., 70, in note,) by the provisions of the Revised Statutes, (Part III., ch. v., title 4, vol. 2, 256,) which prescribe the form of the writ, directing the jury that inquires of the nuisance, if they find for the plaintiff to assess the damages; and which also declare that the judgment, in case the plaintiff prevails, shall be as heretofore accustomed, that the nuisance be removed, and that the plaintiff recover the damages occasioned thereby.

‡ To bring an assize of nuisance, it was necessary that the plaintiff should show a freehold estate in the premises; but in the action on the case, it is only necessary to prove that he is in possession. *Cornes vs. Harris*, 1 Comstock, 223. The remedy by assize of nuisance has long been obsolete in England, and there is said to have been but one such writ prosecuted in New York. *Kintz vs. McNeal*, 1 Denio, 486.

§ *Supra*, 82 and 84, and cases cited.

¶ *Iveson vs. Moore*, 1 Salk., 15.

¶ *Lansing vs. Smith*, 4 Wend., 9. See, also, to S. P., *Lansing vs. Wiswall*, 5 De-



“sustains no damages by the erection of a nuisance, whether direct or consequential, but that which the law presumes every citizen to sustain because it is a common nuisance, no action will lie; but every individual who receives actual damage from a nuisance, may maintain a private suit for his own injury, although there may be many others in the same situation.”\* It has been questioned whether the injury from a nuisance to authorize a private suit must be direct, or whether a consequential injury would suffice, but it seems now settled that it is sufficient if *peculiar* or *special* damage result therefrom, though it be consequential and not direct. So, where in consequence of the defendants mooring a barge across a canal the plaintiffs were obliged to carry their goods overland.† But a claim for damages against a turnpike company, arising from the plaintiffs *not attempting* at certain times to travel a public highway because of its general badness, is hypothetical, and does not constitute such peculiar damage as to give a private action for a public nuisance.‡

And in Connecticut, where the grievance complained of consisted in the erection by the defendant of a dam in a public navigable creek, by means of which the plaintiff was prevented from passing along such creek from his residence above to the land below, and the converse, it was held that such obstruction was not the subject of a private action.§

The general principle which we have heretofore considered| limiting liability for damages to those consequences of the act complained of, which a due exercise of caution could not avoid or obviate, has been applied to nuisances, and it is well settled,

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nio, 218. Dougherty *vs.* Bunting, 1 Sand. Sup. Ct. Rep., 1; and see, also, First Baptist Church *vs.* Sch'y & Troy R. R., 5 Barb. S. C. R., 79. Irwin *vs.* Dixon, 9 Howard, 10. See the subject considered in Dobson *vs.* Blackmore, 9 Q. B., 991; where it is held that the obstruction of a public navigable river is not a damage to a *reversioner out of possession* of premises abutting thereon. So in regard to mandamus, if a nuisance is not more injurious to the relators than to the inhabitants at large, the remedy is only by indictment. Councils of Reading *vs.* Commonwealth, 11 Penn. State R., 196.

\* See People *vs.* Corporation of Albany, 11 Wend., 589, to same point. Allen *vs.* Ormond, 8 East, 4, and Story *vs.* Hammond, 4 Ohio, 876. Simpson *vs.* Seavy, 8 Greenleaf, 188. City of Georgetown *vs.* Alexandria Canal Co., 12 Peters, 91. In South Carolina, see Carey *vs.* Brooks, 1 Hill's Rep., 865.

† Rose *vs.* Miles, 4 M. & S., 101.

‡ Baxter *vs.* Winoski Turnpike Co., 22 Verm., 114.

§ Seeley *vs.* Bishop, 19 Conn., 128.

| Supra, 98.

that to entitle the plaintiff to an action for damages resulting from this cause, he must be able to show that he acted with common and ordinary caution, or, at all events, that his want of care has not increased the injury. So in the King's Bench, where the plaintiff, who was riding violently on a public highway, was thrown down and injured by means of an obstruction placed there by the defendant, it was proved, that if the plaintiff had not been riding very hard he might have seen the obstruction and avoided it, and on this ground he failed to recover, Lord Ellenborough saying, "a party is not to cast himself upon an obstruction which has been made by the fault of another, and avail himself of it, if he do not himself use common and ordinary caution to be in the right; one person's being in the fault will not dispense with another's using ordinary care for himself."\* And the same principle has been recognized in various cases in England and in this country.† We shall have occasion to consider this subject again when we come to speak of the measure of damages in cases of trespass generally.‡

In a case in Massachusetts, where an action on the case was brought for a nuisance upon the plaintiff's land, occasioned by the discharge of impure water from the defendant's brewery into the plaintiff's clay pits, through a drain which the defendant dug from his premises to those of the plaintiff, it appeared that the water had become so stagnant and offensive as to be complained of as a nuisance, and that the Boston board of health had ordered one of the clay pits to be filled up by the plaintiff; and it was held that the expense of filling up the pit should be included in the assessment of damages.§

In Pennsylvania, it has been decided that in an action on the case for a nuisance, the defendant could not be made liable for an erroneous opinion that a dam erected by him was in proper order for the passage of vessels.||

In the same State consequential injuries to property to

\* *Butterfield vs. Forrester*, 11 East, 60. *Carlisle vs. Holton*, 8 La. Ann. R., 48.

† *Flower vs. Adam*, 2 Taunt., 814. *Smith vs. Smith*, 2 Pickering, 621. *Wheaton's Selwyn's Nisi Prius*, vol. ii., 1189. The doctrine of *Butterfield vs. Forrester*, was expressly recognized by the English Court of Exchequer, in *Bridge vs. The Grand J. B. Co.*, 8 Mees. & Wels., 246; and *Davies vs. Mann*, 10 Mees. & Wels., 545.

‡ Post, Ch. XVIII.

§ *Shaw vs. Cumiskey*, 7 Pick., 76.

|| *Roush vs. Walter*, 10 Watts, 86.

which a private alley is not appurtenant, are inadmissible in evidence in an action for a nuisance destroying the use of the alley.\*

“Every continuance of a nuisance is held to be a fresh one, and therefore a fresh action will lie.”† “And,” says Blackstone,‡ speaking of the same subject, “very exemplary damages will probably be given if, after one verdict against him, the defendant has the hardness to continue it.”§ On this ground, that suit can be brought *toties quoties*, it has been decided, that in an action on the case for a nuisance, damages sustained subsequent to the bringing of the action, are not recoverable.]

In regard to permanent or continuing nuisances, it has been questioned how far the defendant is liable after he has parted with the possession of, or the title to, the premises. As a general rule, the erector of the nuisance is answerable for the continuance of it, not only where he has demised the property with nuisance on it, reserving rent, but where the erection was made on the land of another, and though he has no right to enter for the purpose of removing it.¶ On this point it has been held in New York, that where the defendant has conveyed the lands on which the nuisance had been placed by him, and surrender-

\* *Commissioners of Kensington vs. Wood*, 10 Penn. State R., 98.

† 8 Black. Com., 220. *Vedder vs. Vedder*, 1 Denio, 257. So, also, in New Jersey, *Delaware & Raritan Canal Co. vs. Wright*, 1 Zabriskie, 469.

‡ Book III., Ch. 18.

§ “If a party, against whom a verdict in an action of this kind has been recovered does not abate the nuisance, another action may be brought for continuing the nuisance, in which the jury will be directed to give large damages.”—Wheaton’s *Selwyn’s Nisi Prius*, vol. ii., 1141.

| *Duncan vs. Markley*, 1 Harper, 276. *Blount vs. McCormick*, 3 Denio, 283; and *Vide supra*, 105 and 107, as to damages resulting from nuisances after suit brought. And see, to S. P., *Thayer vs. Brooks*, 17 Ohio, 489.

¶ *Rosewell vs. Prior*, 12 Mod., 635; 1 Lord Raym., 718; and 2 Salk., 460, S. C. *Thompson vs. Gibson*, 7 Mees. & W., 456. *Holmes vs. Wilson*, 10 A. & E., 503. *Staple vs. Spring*, 10 Mass., 74. *Fish vs. Dodge*, 4 Denio, 311. But, though there is a legal obligation to discontinue a trespass or remove a nuisance, no such obligation lies on a trespasser to replace what he has pulled down or destroyed upon the land of another, though he is liable in trespass to compensate in damages for the loss sustained. Therefore, where the owner of a coal mine excavated as far as the boundary, and continued the excavation wrongfully into the neighboring mine, leaving an aperture in the coal of that mine, through which water passed and did damage, held that, though the party excavating was liable in trespass for breaking into the neighboring mine, he was not liable in case for omitting to close up the aperture on his neighbor’s soil, though continuing damage resulted. *Clegg vs. Dearden*, 12 Q. B., 575.

ed the possession to his grantee, before the time when the plaintiff acquired title or possession of the lands which were subsequently injured, and without any covenant of warranty, or agreement to uphold the grantee in the occupancy of the premises, no action will lie against such former owner and erector of the nuisance. But though the defendant is out of possession at the time the injury was committed, and another person has the entire possession, still, if the defendant was the erector of the nuisance, and owner of the premises, and under any agreement to uphold the occupant in possession, or if he have conveyed the premises with warranty, the action will lie against him on the ground that, by such relation with the occupant, he has affirmed the continuance of the nuisance, and that it may be said to be a continuance by himself, and in such case he is liable, of course, for damages subsequent to the conveyance and down to the commencement of the suit.\*

Injuries to real estate are sometimes redressed by actions of trespass *de bonis asportatis*, or trover, as in the case of coal mines, or destruction of growing trees ;† but this class of cases will fall most properly under the head of torts to personal property.

It would be improper, while speaking of trespasses to real property, to omit mention of the right given by the English law to distrain beasts doing damage, or in the old Norman French, "*damage feasant*." The right is strictly limited to the time when the beasts are actually committing the trespass ; "the beasts must be damage-feasant at the time of the distress, and if they were damage-feasant yesterday and again to-day, they can only be distrained for the damage they are doing when they are distrained. And if many cattle are doing damage, a man cannot take one of them as a distress for the whole damage, but he may distrain one of them for its own

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\* *Blunt vs. Aikin*, 15 Wendell, 522. *Waggoner vs. Jermaine*, 8 Denio, 806. *Staple vs. Spring*, 10 Mass. Rep., 72, 77. Angell on Water-courses, 152, and cases there cited. A subsequent purchaser of premises injured by a nuisance erected previous to his purchase, has a remedy for the injury occasioned by the continuance of the nuisance. *Brady vs. Weeks*, 8 Barb. S. C. R., 157.

† So where a reversioner brought trover against his tenant for cutting some branches off of the trees growing on the demised close, it was held that the plaintiff was entitled to nominal damages, though no proof of the value was given at the trial. *Cotterill vs. Hobby*, 4 B. & C., 465. See *Wild vs. Holt*, 9 Mees. & Wels., 672. *Morgan vs. Powell*, 8 Q. B. Rep., 278. *Martin vs. Porter*, 5 Mees. & Wels., 351 ; and Vide Post, Ch. XXII.

damage, and bring an action of trespass for the damage done by the rest."\*

Another class of injuries to real estate, according to most of the systems which derive their origin from the English jurisprudence, is taken under the special protection of the statute law, and redressed by the infliction of double or treble damages; but of these we shall speak when we come to the subject of damages as regulated by statutes.

We close this subject with the consideration of Waste.

"Waste, *vastum*," says Mr. Justice Blackstone,† "is a spoil or destruction in houses, gardens, trees, or other corporeal hereditaments, to the disherison of him that hath the remainder, or reversion in fee simple, or fee tail."

This subject might, perhaps, be classed among actions for the recovery of real estate, but as the proceeding does not always result in a change of the property, I have thought it more properly classified among suits brought for interferences with its enjoyment.

The punishment for waste was by common law, and by the statute of Marlbridge,‡ only single damages, but by the statute of Gloucester§ it was provided that the tenants therein mentioned should forfeit the place wasted, and treble damages to him that had the inheritance.

At common law the action of waste lay against tenants in dower and guardians, and the better opinion seems to be that it also lay against a tenant by the courtesy;¶ but by the statute of Marlbridge and the statute of Gloucester, above referred to, it was given against every person holding a lease for life or lives, or for years; and by the latter act, the damages which before were single, were in the cases specified in that statute trebled.¶

\* Hoskins *vs.* Robbins, 2 Saund., 827. Vasper *vs.* Edwards, 12 Mod., 660. Clement *vs.* Milner, 8 Esp., 95. Wormer *vs.* Biggs, 2 Car. & Kir., 81.

† Comment., Book II., Ch. 18, § 6, 281. See, also, the Common law with regard to Waste, very learnedly expounded by Lord Chief Justice Eyre, in Jefferson *vs.* Bishop of Durham, 1 Bor. & Pull., 120; and Story's Equity Juris., § 909.

‡ 52 Hen. III., Ch. 28.

§ 6 Edw. I., Ch. 5.

¶ Sayer on Damages, Ch. 7, 29. 2 Inst., 299, 305, 145, 300. Bl. Com., II., 282, Ch. 18.

¶ *Statutum de Marlberge*. Statutes made at Marlbridge, 52 Hen. III., A. D. 1267, chap. 28. "Also, Fermors during their terms shall not make waste, &c., &c., \* \*

Damages were not, however, recoverable for waste committed pending the suit, and these were given in an action of estrepement.\*

In New York, an action for waste is given by statute† against guardians, tenants by the courtesy, tenants in dower, for life or years, or their assigns; and by the same statute, if default be made, or if any issue of fact is awarded, "the jury that inquire of the waste done, shall also assess the damages occasioned thereby."

If the action be brought by any other than a tenant in common or joint tenant, the plaintiff recovers the place wasted, and treble the damages assessed by the jury. If it be brought by a tenant in common, or joint tenant, against his co-tenant, the plaintiff may elect to take treble damages or to have partition of the premises; and in case he elects the latter, the object is to be effected by actual partition or sale, and in either case the single damages found by the jury are to be deducted from the defendant's share.‡

Damages were not recoverable at common law, as we have said, for waste committed pending the action of waste; and this is provided for by the same statute which declares, that after the commencement of any action for the recovery of land or for its possession, the court may, by order, restrain the defendant from committing waste; but in the action of waste itself, the positive language of the above provision, probably goes far enough to give damages for waste committed pending the suit.

The effect of this statute§ has been said to be to give the Supreme court the same power to restrain and prevent waste,

which thing if they do, and thereof be convicted, they shall yield *full damage*, and shall be punished by amerciamment grievously."

*Statuta Gloucestre*'. Statutes made at Gloucester, 6 Edw. I., A. D. 1278. "It is provided, also, that a man from henceforth shall have a writ of waste, &c., against him that holdeth by law of England, or otherwise, for term of life or for term of years, or a woman in dower. And he which shall be attainted of waste shall leese (*perde*) the thing that he hath wasted, and moreover shall recompense thrice so much as the waste shall be taxed at."

\* Sayer on Damages, Ch. 7, 34.

† 2 R. S., 335, Part III., Ch. V., Tit. 5.

‡ By 1 R. S., 141, 2d edition, remaindermen and reversioners may bring waste, notwithstanding an intervening estate for years.

§ Savage, J., in the *People vs. Alberty*, 11 Wend., 162.

which is exercised by the court of Chancery, and in this case, and in another,\* it was held that the order might be made *ex parte*. And in a later case,† it has been said to be a copy of the statute of Marlbridge.‡

Independent of the statute, however, there is no doubt that an action on the case can always be maintained, in which the party injured will recover the damages which he has actually sustained.§ In such a proceeding, however, the forfeiture of the place wasted is waived, at least as far as the proceeding itself is concerned.

The question whether, as matter of law, waste has been committed, is very closely connected with the question of damages in this action, and on this point many cases have been decided. But the inquiry does not come properly within the scope of the present work.|

In Massachusetts, treble damages are given for waste, and they may be recovered in an action of debt.¶ And the statute of Gloucester, in regard to waste, has been declared to be a part of the law of the state, except with regard to tenants in dower.\*\*

“It is common learning,” said Heath, J., in the English Common Pleas,†† “that every lessee of land, whether for life or years, is liable in an action of waste to his lessor for all waste done on the land in lease, by whomsoever it may be committed.” And this has been recently recognized in New York.‡‡ And so where land had been demised to the plaintiff at an annual rent, for years, with liberty to dig half an acre of brick earth annually, and the lessee covenanted that he would not dig more, or if he did, that he would pay an increased rent of £375 per half acre, “being after the same rate that the whole

\* *Burt vs. Phillips*, 8 Wend., 428.

† By Nelson, J., in *Carris vs. Ingalls*, 12 Wend., 70.

‡ As to estrepement of waste in Pennsylvania, see *Dickinson's Lessee vs. Nicholson*, 2 Yeates, 281.

§ *Winship vs. Pitts*, 8 Paige, 259.

| For cases of this nature, see *Comyn's Digest*, tit. Waste; *Harrison's Digest*; and *Livingston vs. Reynolds*, 26 Wend., 115.

¶ *Reed vs. Davis*, 9 Pick., 514.

\*\* *Sackett vs. Sackett*, 8 Pick., 809. See *Paddleford vs. Paddleford*, 7 Pick., 152, and particularly as to what is waste. In Pennsylvania, as to what is waste, see *Hastings vs. Crunkleton*, 8 Yeates, 261, and *Shult vs. Barker*, 12 S. & R., 272.

†† *Attersoll vs. Stevens*, 1 Taunt., 182 and 198.

‡‡ *Cook vs. Champlain Transportation Co.*, 1 Denio R., 91.



brick earth was *sold for*," and a stranger dug and took away brick earth, it was held that the lessee should recover of him the full value of it, on the ground that the brick earth was, by the terms of the lease, sold to the tenant, as well as that he would be liable over for the waste to his landlord.

In the action of waste it was originally necessary, in order to entitle the plaintiff to judgment, that the damages found should be something more than nominal; and the sum of three shillings and four pence appears to have been arbitrarily fixed on as the minimum of damage which would authorize a party to bring such action.\* This doctrine has been in England extended to the action on the case for injury to the reversion, though not in reason applicable.† The commutation was originally introduced on the ground that in the action of waste, the place wasted was forfeited, and it was thought not just that the tenant should forfeit his estate for every trifling act of waste; but in actions for injuries to the revisionary interest, the injury complained of may be merely that the act in question, will perhaps be afterwards relied on as evidence of the tenant's absolute property in the tenement; here the object of the action is simply to assert the reversioner's right of property, and not to recover damages.‡

Case lies by reversioner against one who erects a dam on the adjacent land and backs the water on the plaintiff's mill race.§ But this branch of our subject I have already considered, when treating of suits brought by reversioners.

Waste is well known by the name of *degradations* in the French law, and it will be found treated of in the *Code Civil* under the proper head.]

\* *Gov'r of Harrow School vs. Alderton*, 2 B. & P., 88.

† *Rigg vs. Parsons*, cited 2 East, 156.

‡ *Pindar vs. Wadsworth*, 2 East, 154. *V. Redfern vs. Smith*, 8 Moo., 448; 1 Bing., 382; 2 Bing., 262. *Gibbons on the Law of Dilapidation and Nuisances*, 78.

§ *Ripha vs. Sergeant*, 7 Watta. & Serg., 9.

[See the titles of *Usufruit*, Art. 578, et seq. et *Le Contrat de Louage*, Art. 1708, et seq. Under the first head are stated, with great care, the precise acts which the usufructuary can do without committing waste.

I am favored by the Hon. E. Fitch Smith, First Judge of the Ontario Common Pleas, with the report of the following case decided by him. *Nottingham vs. Osgood*.

I. In an action on the case in nature of waste, where the Court on the trial instructed the jury on the subject of damages, to "inquire whether by reason of the additions and alterations made by the defendant, the premises were rendered less or more valuable; if less valuable by reason thereof, then the plaintiff would be entitled



The question of the measure of damages for waste committed by tenants often arises in actions of covenant brought on the lease, and we may have occasion to recur to the subject when we come to consider personal actions of this class.

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to recover the actual damage he had sustained, to be ascertained by the jury from all evidence in the cause; but if, from the evidence, the jury should be satisfied that the premises, by reason of such alterations and erections, were in point of fact more valuable; that, then, although the act of the defendant was a technical wrong, yet that the plaintiff, under such circumstances, would only be entitled to nominal damages." Held erroneous, and for that reason a new trial ordered.

II. Where a tenant, during the continuance of his term, made material and essential alteration of the buildings, and erected additions without the consent of his landlord—held that he was not entitled to any remuneration for the materials and erections, even although the general value of the premises were thereby enhanced, upon the principle that the act being tortious, he could not claim any benefit or remuneration for his own wrong.

III. In an action on the case in the nature of waste, the jury, in estimating the damages, are not to take into consideration whether the general value of the premises have been enhanced or depreciated by reason of the act of the defendant, but simply whether they are depreciated as to the plaintiff. In such action, on estimating the plaintiff's damages, where the alterations and changes made by the tenant are of such a nature as to admit of the premises being restored to their condition at the time of the demise, the jury may take into consideration what sum would be equivalent to the costs and expenses incident to the restoration of the demised premises to their original state at the time of the demise. Under a declaration properly framed for that purpose, if the premises are, at the time of their surrender, by the act of the defendant rendered untenable, the jury may also take into consideration the value of the rent, or the use of the premises, for such period of time as would be requisite to put them in a tenable state.

IV. If the changes amount to a total destruction of any part of the demised property, such as shade trees and ornamental shrubbery, the jury may also take into consideration the actual value of the property totally destroyed, with reference to their original state and condition at the time of the demise, and their value to the owner of the reversion.

In Tennessee, where land is sold at execution sale, and the purchaser takes possession, and the land is redeemed, the owner is not entitled to rent or damages for waste before the redemption, but he is entitled to rent for the time he was wrongfully kept out of possession after redemption. *Kannon vs. Pillow*, 7 Humphreys, 281.

"Though a disseisee may have his action of trespass *quare clausum fregit* against the disseisor for the injury done by the disseisin, at which time the plaintiff was seised of the land, he cannot have it for any act done after the disseisin until he gain possession by reentry; and then he may maintain it for the intermediate damage done, for, after his reentry, the law, by a kind of *jus postliminii*, supposes the freehold to have all along continued in him." Black. Com., 8, 210. Kent's Com., 4, 119. *Ex'rs of Stevens vs. Hollister*, 18 Verm., 294.

## CHAPTER VI.

### RULE OF DAMAGES IN ACTIONS BROUGHT FOR THE BREACH OF REAL COVENANTS.

The Ancient Warranty—Modern Covenants—The *Stipulatio Duplex* and *Edictum Edilium* of the Roman Law—Rules of the Modern Civil Law, in cases of Eviction—Of the French Code—Measure of Damages according to the Common Law, in case of Eviction—On the Covenants for Quiet Enjoyment, and of Warranty—Consideration named in the Deed—Measure of Damages on the Covenant of Seisin—On the Covenant against Incumbrances—On Covenants to convey Lands—Covenants in Leases.

THE ancient warranty was in substance a covenant, whereby the grantor of an estate of freehold and his heirs were bound to warrant the title, and either upon voucher or judgment in a writ of *warrantia chartæ*, to yield other lands to the value of those from which there had been an eviction by a paramount title.\* Upon eviction of the freehold, no personal action lay at common law upon the warranty. The party had only a writ of *warrantia chartæ* upon his warranty to recover a recompense in value to the extent of his freehold.† For reasons assigned by Blackstone,‡ in modern practice the covenant has totally superseded the warranty; and to this end various statutes have contributed. Such is the statute§ making void all warranties by tenant for life, as against any reversioner or remainderman; and, as against the heir, all collateral warranties by any ancestor who had no estate of inheritance in possession; and these statutes have been generally reenacted in this country.¶

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\* Co. Litt., 865 a, and Reeves' Engl. Law, vol. i., 448.

† Kent's Com., Vol. iv., 469.

‡ Bl. Com., Book II., Ch. 20, 800; and see, also, Co. Litt., 884 a, for "divers other diversities between warranties and covenants, which yield but damages."

§ 4 & 5 Anne, c. 16.

¶ It is certainly so, at least, in New York. The statute of 4 & 5 Anne, c. 16, was

The usual personal covenants contained in a deed, the rule of damages in relation to which we shall now proceed to examine, are, *First*, that of seisin, or that the grantor is lawfully seised. *Second*, that he has good right to convey, which has been called synonymous with the covenant of seisin.\* *Third*, that the premises are free from incumbrances. *Fourth*, for quiet enjoyment, or that the grantee shall quietly enjoy. *Fifth*, of warranty, or that the grantor shall warrant and defend the title against all lawful claims; and, *Sixth*, the covenant for further assurance.†

In regard to all these covenants the rule is general, that no substantial relief will be given till the party complaining has actually suffered injury. It is not sufficient that he is menaced by an outstanding title or incumbrance. The covenantee cannot have anything more than nominal damages until he has been damnified in consequence of a breach of the covenant.‡ But it often becomes a question what constitutes a breach, and what a damage, sufficient to found a claim for remuneration.

In regard to the three first, if the title is defective, or incumbrances exist at the time of the conveyance, there is a breach as soon as the deed is executed. But those of warranty and quiet enjoyment are prospective, and an actual ouster or eviction is, in general, necessary to constitute a breach.§ It is of the rule of damages for eviction, in a suit brought to enforce these covenants, that we shall first speak.

It is apparent that the real covenants are, to some extent, cumulative; thus a covenant for quiet enjoyment is broken by an eviction under a prior mortgage, which would equally be a breach of that against incumbrances. The rules of damages on the various covenants consequently run into each other, but the most intelligible mode of treating the subject will be, as far as possible, to consider them separately.

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reënacted in New York in 1788; and finally the Revised Statutes of the same State, (Vol. I., 789, § 146,) have abolished both lineal and collateral warranties with all their incidents, and have made heirs and devisees answerable upon the covenant or agreement of the ancestor or testator, to the extent of the lands descended or devised. And it has been further declared, (Sec. 140,) that no covenants shall be implied in any conveyance of real estate, whether such conveyance contain special covenants or not.

\* *Rickart vs. Snyder*, 9 Wendell, 416.

† *Dimmick vs. Lockwood*, 10 Wend., 149.

‡ *Nyce's Ex'rs vs. Obertz*, 17 Ohio, 71.

§ *Kent's Comm.*, vol. iv, 471.

First, however, we will examine the analogies of the Civil Law. The *stipulatio duplex* was the remedy provided by the Roman law for cases of eviction,\* and for the breach of warranties that were sometimes required on the sale of property under the *Edictum Aedilium*.†

\* Pothier, Pandectes, par Bréard Neuville, vol. viii. 97.

† The *Edictum Aedilium* was applied more particularly to sales of chattels than to real estate; but it will not be considered out of place here.

Aiunt aediles, "qui mancipia vendunt certiores faciant emtores quid morbi vitiiue cuique sit; quis fugitivus, errove sit, noxave solutus non sit. Eademque omnia cum ea mancipia venibunt palam ac recte pronuncianto. Quod si mancipium adversus ea venisset, sive adversus quod dictum promissumve fuerit quum veniret fuisset; quod ejus (nomine) praestari oportere dicetur, emptori omnibusque ad quos ea res pertinet iudicium dabimus ut id mancipium redhibeatur. Si quid autem post venditionem traditionemque deterius emptoris opera familiae procuratorisve ejus factum erit; sive quid ex eo post venditionem natum acquisitum fuerit et si quid aliud in venditione ei accesserit, sive quid ex ea re fructus pervenerit ad emptorem; et ea omnia restituat. Item si quas accessiones ipse praestiterit, ut recipiat.

"Item si quod mancipium capitalem fraudem admiserit, mortis consciscendae, sibi causa quid fecerit, iuve arenam depugnandi causa ad bestias intromissus fuerit; ea omnia in venditione pronuncianto; ex his enim causis iudicium dabimus. Hoc amplius, si quis adversus ea sciens dolo malo vendidisse dicetur, iudicium dabimus." *Dig., Lib. 21, § 1. Ulp. ad Ed. edil.*

This edict gave three species of actions: (1.) the *actio redhibitoria*, which was similar to our action founded on the right to return the chattel and demand the price paid; (2.) the *actio estimatoria*, or *actio quanti minoris*, analogous to our action for the difference between the actual value and the value that the article would have had if without blemish, or according to the warranty or representation; and, (3.) the action grounded on the vendor's fraud, given by the last section. And the edict applied to all sorts of animals as well as to slaves. Pothier, Pandectes, edit. de Bréard Neuville, vol. viii., 8 and 10. And in certain cases to real estate, 55.

As to the rule of damages in the actions *redhibitoria et quanti minoris*, various cases are stated in the Digest.

Labeo scribit, "Si uno pretio plures servos emisti, et de uno agere velis, (inter) aestimationem servorum proinde fieri debere, atque ut floret in aestimationem bonitatis agri, quum ob evictam partem fundi agatur."—*Dig., 22, § 64, Pomp., lib. 17.*

"Si plura mancipia uno pretio venierint et de uno eorum aedilitia actione utamur, ita demum pro bonitate ejus aestimatio fiat si confuse universis mancipiis constitutum pretium fuerit. Quod si singulorum mancipiorum constituto pretio, universa tanti venierunt, quantum ex consummatione singulorum fiebat, tunc cujusque mancipii pretium seu pluris, seu minoris id esset seque debemus."—*Dig., 21, § 86.*

So interest was to be paid to the buyer on the price given; and if the slave had made anything while in the buyer's possession, but without his means or assistance, such acquisitions were to be returned with the slave to the purchaser. Poth. Pan., vol. 8, 75.

And in certain cases both the vender and purchaser were held to give each other guarantees, to which the rule of the *stipulatio duplex* applied. Poth. Pan., v. 8, 99. The rule of damages in the *actio redhibitoria* was not, however, always the double value.

Redhibitoria actio duplicem habet condemnationem modo enim in duplicem, modo in simplum condemnatur venditor. Nam si neque pretium, neque accessionem solvat

And by the *stipulatio*, the rule of damages was in most cases fixed at double the price of the article in question. *Quod autem diximus, duplam promitti oportere, sic erit accipiendum at non ex omni re id accipiamus; sed de his rebus quæ pretiosiores essent; si margarita forte aut ornamenta pretiosa vel vestis serica, vel quid aliud non contemptibile veneat.\**

Under the system of the civil law, as introduced into modern Europe, as no distinction was made on this subject between real and personal property, or *mobiles* and *immobiles*, so the remuneration was the same, whether the claim was founded on the non-delivery of the article, or an eviction after possession.† And in all these cases the price of the article seems to have been the basis of the measure of damages; but as with chattels, so with land, the increased value of the property was taken into account, and for this the party evicted had a right to claim. A distinction was, however, made, to which we have already had occasion to advert, between the seller in good faith and the party who knew he had no title to convey. Thus, if by reason of circumstances, which could not have been foreseen at the time of the contract, the value should be very greatly augmented, the seller in good faith would only be liable for the highest sum to which the parties might have reasonably supposed that the value would rise;‡ in many cases, certainly, a difficult inquiry.

So, again, the seller in good faith was only liable for direct damages, while more remote loss would be charged upon the seller in bad faith.. Thus, if after the purchaser entered into possession he should establish an inn on the premises and be subsequently evicted, the seller in good faith was not chargeable for the injury done to the business of the inn. But the seller in bad faith would in such a case be held liable.§ And even the seller in good faith would be held answerable under similar circumstances, if, at the time of the bargain, the property

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neque eum qui eo nomine obligatus erit, liberet, dupli pretii et accessionis condemnari jubetur; si vero reddat pretium et accessionem, vel eum qui eo nomine obligatus est, liberet simpli videtur condemnari. *Dig., lib. xxi., tit. 1, § 45.*

\* *Dig., lib. xxi., tit. 2, § 87.* Pothier *Pan.*, ed. Bréard Neuville, vol. 8, 146.

† Pothier, *contrat de Vente*, Part II., ch. 1, sec. 1. Art. 5, § 69.

‡ Pothier, *contrat de Vente*, Part II., ch. 1, sec. 2. Art. 5, § 180.

§ Pothier, *Vente*, Part II., ch. i., § 2. Art. 5, § 186.

was intended to be used as an inn. In all these cases much was left to the discretion of the judge.\*

It was held by the masters of the civil law, that the fortuitous depreciation of the property did not alter the rule; as if, after the contract, buildings were to burn down, and eviction subsequently take place, the measure of damages would still be the price paid, and so it would probably be held with us.†

In the French code the subject of evictions is treated with the usual brevity, order, and precision of that great work. The clauses which relate to the subject are as follows:

Where a warranty has been given, or where no stipulation has been made on this subject, in such case, if the purchaser is evicted he is entitled to demand from the seller,

I. The restitution of the purchase money.

II. The restitution of any mesne profits which he may be obliged to pay over to the proprietor who evicts him.

III. The expenses incurred on the demand under the warranty of the buyer, and those incurred by the person originally making the demand.

IV. The damages and interest as well as the expenses and legal costs of the contract.

If, at the time of the eviction, the thing sold proves to be lessened in value or considerably injured, whether by the negligence of the buyer or owing to accidents resulting from superior force, the seller is in either case liable for the entire purchase money.

But if the diminution in the value of the article has produced any profit to the buyer, the seller has a right to deduct from the purchase money a sum equal to this profit.

In case the thing sold is increased in value at the time of the eviction, and even if such increase be independent of any acts of the purchaser, yet he is entitled to receive from the seller its actual value over and above the purchase money.

The seller is bound to reimburse the purchaser, or to cause him to be reimbursed by the party evicting him, for all actual improvements and beneficial repairs that he shall have made to the property.

If the seller has sold the lands of a third person in bad faith, he will be

\* *Observez*, says Pothier, § 188, que par la liquidation et estimation de ces dommages, on doit user de beaucoup plus de moderation à l'égard d'un vendeur de bonne foi qu'à l'égard d'un vendeur de mauvaise foi.

This distinction between the vender acting in bad faith and bona fide, will be found clearly illustrated in *Ld. Kaime's Equity*, 270; *Erskine's Inst.*, 125, and see, also, *Green vs. Biddle*, 8 *Wheaton*, 1.

† Pothier, *Vente*, Art. 69.

compelled to reimburse the purchaser for all sums which he may have expended upon them, although such expenses be merely pleasurable or fanciful.\*

Very little learning is to be found in the English books on the subject of the measure of compensation for the covenants contained in conveyances, and it will be more convenient, at once, to group together those authorities before we proceed to that fuller discussion of the matter which will result from the examination of the American decisions.

It was early held, in a case in which the eviction was by lease for years, that an action of covenant to recover damages could be founded on a clause of warranty real annexed to a freehold, and it was so agreed by all the judges in the Exchequer chamber.

"Because, that though the warranty was annexed to a freehold, yet the breach and impeaching was not of a freehold, but of a chattel; that is to say, of a lease for years, for which there could be neither a voucher, rebutter, nor *warrantia chartæ*. So, that though there had been a judgment in the *warrantia chartæ* in the case, yet neither upon entry nor upon recovery in *eject'firmæ* upon this lease, there would be neither a voucher nor rebutter, nor value upon the *warrantia chartæ*, and therefore a real warranty is a covenant real when the freehold is brought in question. But where a lease is in question, or any other loss that doth not draw away the freehold, it may be used

\* 1680. Lorsque la garantie a été promise, ou qu'il n'a rien été stipulé à ce sujet, si l'acquéreur est évincé, il a droit de demander contre le vendeur,

I. La restitution du prix.

II. Celle des fruits, lorsqu'il est obligé de les rendre au propriétaire qui l'évince.

III. Les frais faits sur la demande en garantie de l'acheteur, et ceux faits par le demandeur originaire.

IV. Enfin les dommages et intérêts, ainsi que les frais et loyaux couts du contrat.

1681. Lorsqu'à l'époque de l'éviction, la chose vendue se trouve diminuée de valeur ou considérablement détériorée, soit par la négligence de l'acheteur, soit par des accidens de force majeure, le vendeur n'en est pas moins tenu de restituer la totalité du prix.

1682. Mais si l'acquéreur a tiré profit des dégradations par lui faites, le vendeur a droit de retenir sur le prix une somme égale à ce profit.

1683. Si la chose vendue se trouve avoir augmenté de prix à l'époque de l'éviction indépendamment même du fait de l'acquéreur, le vendeur est tenu de lui payer ce qu'elle vaut au-dessus du prix de la vente.

1684. Le vendeur est tenu de rembourser ou de faire rembourser à l'acquéreur par celui qui l'évince, toutes les réparations et améliorations utiles qu'il aura faites au fonds.

1685. Si le vendeur avait vendu de mauvaise foi le fonds d'autrui, il sera obligé de rembourser à l'acquéreur toutes les dépenses, mêmes voluptueuses ou d'agrément que celui-ci aura faites au fonds.



as a personal covenant, whereupon damages may be recovered, so it is both a real and personal covenant to several ends and respects."\*

Another case well illustrates that want of any precise measure of damages which characterizes almost all the early English decisions.

"B. covenants that he was seized of B<sup>l</sup> acre in fee simple, when in truth it was copyhold land in fee according to the custom. By the court. The covenant is broken; and the jury shall give damages in their consciences according to that rate, that the county values fee simple land more than copyhold land."†

In an action of covenant,‡ it appeared that one Grylls had made a lease of the moiety of certain tithes of corn and grain to the plaintiff for years, with covenant of title. The plaintiff was ejected by title paramount, and brought suit. On the trial it was contended for the plaintiff, that the true mode of estimating his damages was to ascertain the value of the interest in the term, and to add to the amount thereof the costs of defending the ejectment. But it was insisted by the defendants that the plaintiff was only entitled to recover the fine paid on the making of the lease, the interest thereon to the time of judgment and the costs of defending the ejectment; and, without deciding the point, the King's Bench intimated such to be their opinion.

Again, where the defendant had conveyed to the plaintiff with covenant of title, and the plaintiff had been sued by a party having title paramount, and had paid a sum of money to compromise the claim, it was held that in an action on the covenant he should recover the whole amount paid by way of compromise, together with the costs of the ejectment suit, and that, although no notice of the suit had been given to the defendant.§

In this country, the rule of damages in regard to eviction, is generally presented under the covenant for quiet enjoyment or of warranty; and, in these cases, it is well established that the mere existence of a paramount legal title is not sufficient, but

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\* *Puncombe vs. Rudge*, Hob., 8. See a learned note to this case by Mr. Williams, in his edition of these Reports.

† *Gray vs. Briscoe*, Noy's Rep., 142.

‡ *Pomeroy vs. Partington*, Ex'r of M. Grylls, 3 T. R., 665.

§ *Smith vs. Compton's Ex'r*, 3 Barnwell & Adolphus, 407.



that the plaintiff must allege and prove an ouster or eviction by a paramount title.\*

It need not be, however, by process of law; the grantee may surrender possession, but in such case, he assumes the whole burden of proving that the title to which he surrenders without contest, is actually paramount to that derived from his grantor.† That there must, however, be an actual loss of the land to support the plaintiff's claim, is clear;‡ otherwise he is only entitled to recover nominal damages.§

In North Carolina, where it appeared that at the time of execution of the deed to the plaintiff, and previous thereto, a third person was in possession of the premises under a paramount title, it was held that this was sufficient to constitute a breach of the covenant for quiet enjoyment;|| and in another case,¶ the Supreme Court of the United States said: "If the grantee be unable to obtain possession in consequence of an existing possession or seisin by a person claiming and holding under an elder title, this would certainly be equivalent to an eviction and a breach."\*\*

In regard to the covenant of warranty, the Supreme Court of Massachusetts has decided,†† that where administrators had conveyed a defective title with this covenant, it was broken at the moment of execution, and that the measure of damages was the consideration in the deed and interest; "or, at most, that

\* See Kent's Com., vol. iv., 460, fifth edition. 2 Saunders, 181, b. n. 10. Foster vs. Pierson, 4 T. R., 617, 621.

† St. John et al. vs. Palmer, 5 Hill, 599. And the rule is the same in Massachusetts. Hamilton vs. Cutts, 4 Mass., 849. Sprague vs. Baker, 17 Mass., 586.

‡ Marston vs. Hobbs, 2 Mass. R., 488. In this case, Parsons, C. J., defines the effect of the various covenants with great clearness. See, also, Twambly vs. Henley, 4 Mass., 441. Bearce vs. Jackson, 4 Mass., 408. Chapel vs. Bull, 17 Mass., 218.

§ Waldron vs. McCarty, 8 Johns. R., 471. St. John vs. Palmer, 5 Hill, 599, and cases there cited.

| Grist vs. Hodges, 3 Dev., 198.

¶ Duval vs. Craig, 2 Wheaton, 45, 61.

\*\* It is very correctly stated by the learned reporter, in a note to the case of St. John vs. Palmer, 5 Hill, 601, that these cases are opposed to the New York rule. Waldron vs. McCarty, 8 J. R., 471. Kortz vs. Carpenter, 5 J. R., 120. Kerr vs. Shaw, 18 J. R., 286. Webb vs. Alexander, 7 Wend., 281. St. John vs. Palmer, 5 Hill, 601. The language in that State has uniformly been, that the covenant of quiet enjoyment goes to the possession and not to the title, and that a disturbance of the possession is indispensable. In the case last cited, Bronson, J., said: "If the covenantee never had the possession, or if he had the possession and retains it still, it is impossible that there should have been an eviction, and no action will lie, however hard the case may seem to be. The grantor should have protected himself by other covenants."

†† Sumner vs. Williams, 8 Mass., 162, 221.

amount together with the plaintiff's expenses of defending the possession."

In New York, it has been held\* that where the premises conveyed with covenant of warranty, had been subsequently transferred to another purchaser, the first grantee might proceed directly on the covenant against his grantor.

The question as to the measure of compensation, came up at an early day in the State of New York.† The defendant's testator, Ten Eyck, had conveyed certain lots in Albany to one Walsh, for £300. Walsh had conveyed to Staats—Staats to Chinn, who had been evicted, and had recovered against the plaintiff Staats. The covenants in Ten Eyck's deed were of seisin and for quiet enjoyment; and the two points were, first whether the plaintiff was entitled to recover the value at the time of eviction, or only at that of purchase, and to be ascertained by the consideration given; and, secondly, if the latter, whether the plaintiff was entitled to interest on the purchase money and the costs of the eviction. Kent, C. J., in the course of a very able opinion said, that the rule at common law on a warranty on a writ of *warrantia chartæ*, was that the demandant recovered in compensation only for the land at the time of the warranty made, and that he did not find that the law had been altered since the introduction of personal covenants.

"Upon the sale of lands, the purchaser usually examines the title for himself, and in case of good faith between the parties, (and of such cases only I now speak,) the seller discloses his proofs and knowledge of the title.

"The want of title is, therefore, usually a case of mutual error, and it would be ruinous and oppressive to make the seller respond for any accidental or extraordinary rise in the value of the land. Still more burdensome would the rule seem to be, if that rise was owing to the taste, fortune, or luxury of the purchaser. No man could venture to sell an acre of ground to a wealthy purchaser, without the hazard of absolute ruin."

Mr. Justice Livingston said :

"To find a proper rule of damage in a case like this, is a work of some difficulty; no one will be entirely free from objection, or not at times work injustice. To refund the consideration, even with interest, may be a very inadequate compensation, when the property is greatly enhanced in value, and when the same money might have been laid out to equal advantage elsewhere. Yet

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\* Withy vs. Mumford, 5 Cowen, 187.

† Staats vs. Ten Eyck's Ex'rs, 8 Caines, 111, (1805.)

to make this increased value the criterion where there has been no fraud, may also be attended with injustice, if not ruin.

"A piece of land is bought solely for the purposes of agriculture; by some unforeseen turn of fortune, it becomes the site of a populous city, after which an eviction takes place. Every one must perceive the injustice of calling on a bona fide vender to refund its present value, and that few fortunes could bear the demand. Who, for the sake of one hundred pounds, would assume the hazard of repaying as many thousands, to which value the property might rise, by causes not foreseen by either party, and which increase in worth would confer no right on the grantor to demand a further sum of the grantee?"

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"To prevent an immoderate assessment of damages, when no fraud had been practiced, Justinian directed that the thing which was the object of contract, should never be valued at more than double its cost.

"Rather than adhere to the rule of Justinian, or leave the matter to the opinion of a jury, as to what may or may not be excessive, some more certain standard should be fixed on. However inadequate a return of the purchase money must be in many cases, it is the safest measure that can be followed as a general rule. This is all that one party has received, and all the actual injury occasioned to the other. I speak now of a case, and such is the present, where the grantee has not improved the property by buildings or otherwise, but where the land has risen in value from extrinsic causes. What may be a proper course when dwelling-houses or other buildings and improvements have been erected, we are not now determining.

"Without saying, then, what ought to be the rule, when the estate has been improved after purchase, my opinion is, that where there has been no fraud, and none is alleged here, the party evicted can recover only the sum paid, with interest from the time of payment, when, as is also the case here, the purchaser derived no benefit from the property, owing to a defective title. The plaintiff must also be reimbursed the costs sustained in the action of ejectment."\*

In a subsequent case,† where land had been conveyed with covenants of seisin and quiet enjoyment, and both broken, the

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\* The language of one of the books, as to the rule on warranties, may be worthy of notice. Hil. Sexto., Edw. II., 187.

En un breve de dower le tennant vouch agar' et le gar fist defaute le grande cape retorne ove la extent, \* \* que la terre est extend trop haut qe chescun acor' de terre est extendu a xv. a. ou ele ne voleit al' heure q'e ele passa hors de nostre seisine qe vii. et qe ele est bien compole marle et ovesque ceo bien edifié et ne fut pas en le temps de alíenation p. qi nous prioins aver extente autr: qe n'est fait issi qe nous puissions faire a la value solom ceo que ele passa hors de nostre seisine. \* \* Et nota qe Ber' dit que si le vic fist estendre la terre plus haut qe ele ne volust en temps de alíenation quant breve de seisine luy voudra qe le tennant poet avoir bon remedie sur luy apres ceo p. breve.

Et sic nota la terre le tennant q'est gar doit estre estendu selon ceo qe ele valust en temps de alíenation at non pas en temps de recovery.

† Pitcher vs. Livingston, 4 J. R., 1.

questions were raised whether the plaintiff was entitled to recover damages for the improvements made by him, and for the increased value of the land itself. As to the latter point, all the court appear to have concurred with the case last cited; but as to the question of improvements, there was a disagreement. Spencer, J., was disposed to allow for beneficial improvements.

He said, "Extravagant cases have been put hypothetically to show the enormous injustice of the rule that the vendor must be answerable for improvements. It has been asked if a piece of land, thus sold with covenants, should become the site of a flourishing city, what fortune could, under a rule allowing for improvements, withstand ruin? It may be retorted to such a question, what is to become of the industrious citizen or mechanic who has spent his hard earnings in erecting his little house or workshop, relying on the covenant in his deed, if he can only get back his purchase money and interest? I lay it down as a rule, which cannot require much illustration to enforce it on the score of analogy and justice, that, in actions for a breach of covenant, the damages are to be estimated according to the value of the thing when the covenant was broken. Thus, in a covenant for the delivery of specific property at a given day, in case of a failure, the rule invariably is to allow in damages the value of the thing on the day it ought to have been delivered, and when the covenant was broken. It follows, from the view I have taken of this question, that the plaintiff under the covenant for *quiet enjoyment*, may recover the improvements, and that under the covenant of *seisin*, he could not, unless the grantee was seised by virtue of the deed, and has been evicted under a title paramount. It has, however, been urged that the introduction of the covenants of *seisin* and for *quiet enjoyment*, were substituted for the covenant of warranty, and that the same rule ought to follow the substituted covenants. It appears to me much more proper to consider the introduction of personal covenants in the alienation of real property, as immediately assimilating themselves to other personal covenants and contracts, and as subject to the same rules of construction, and the same rule of damages whenever they are broken. If so, the covenant for *quiet enjoyment* was not broken until the eviction, and the rule of damages would be the property lost at that time, which would include the price paid for the land, and the value of those erections and improvements which had been added at the plaintiff's expense. It is supposed that though the covenants of *seisin* and for *quiet enjoyment* are distinct, and regard different objects, yet that where the first fails the latter is merged in it. This principle strikes me as illogical and unfounded in authority.

"There are authorities which show that, where in a deed a man covenants that he hath a good right to convey, &c., and that the party shall quietly enjoy, one covenant goes to the title, and the other to the possession—and why a person who has broken two distinct agreements should protect himself from a

responsibility on both, and be liable only on the least extensive one, surpasses my powers of comprehension."

The other members of the Court were, however, of a different opinion. Van Ness, J., said :

" This Court has already determined that the plaintiff is not entitled to recover any damages on account of any increased value of the land. Here a distinction is attempted to be made between an appreciation of the land itself, and that appreciation of it which is produced by the erection of buildings, or the labor bestowed upon it in clearing and cultivating ; a very nice, and, as I apprehend, a speculative distinction to which it would be difficult, if not in most cases impossible, to give any practical effect without danger of the most flagrant injustice.

" It is conceded that upon the covenant of *seisin* only, the recovery is to be confined to the consideration and interest. On the covenant for *quiet enjoyment*, therefore, the plaintiff must rely to recover compensation for his improvements. Let us, then, examine whether, consistently with certain fixed legal principles, the covenantee can recover a greater sum of damages in any case under the covenant for quiet enjoyment than under the covenant of *seisin* ?

" An eviction must be shown before a suit can be maintained on the former covenant. Not so, however, as to the latter, for that is broken, if the grantor has no title, the moment the deed is delivered ; and the grantee has an immediate right of action. Whenever the eviction is occasioned by a total want of title in the grantor, then both the covenants of *seisin* and for quiet enjoyment are equally broken ; and the grantee has his remedy on both. If he proceeds upon the first, he shall recover the consideration expressed in the deed, and the interest. But if he proceeds upon the last, it is said he shall recover according to the value at the time of eviction, and as I have before remarked, he must be content to recover according to the then value, even though it amounts to one half only of the consideration expressed in the deed.

" The case would then stand thus : When the deed contained both these covenants, if the property at the time of eviction be worth one half of the consideration and interest, the grantee may, notwithstanding, upon the covenant of *seisin* recover the whole consideration and interest. But if the property happen to be worth double the consideration money and interest, by reason of the improvements made thereon, he may waive the covenant of *seisin*, and resort to the covenant for quiet enjoyment, and thus recover the whole amount. Can this be possible ? It appears to me that to give such an effect to these covenants is not reconcilable with any principle of law or justice.

" My understanding of the nature of these covenants, when both are contained in the same deed, is this : that the covenant of *seisin* which relates to the title, is the principal and superior covenant to which the covenant for quiet enjoyment, which goes to the possession, is inferior and subordinate. And I am not aware that a case can possibly occur where the grantee can recover a

greater amount in damages for the breach of the latter than of the former; though there are many cases where he may recover less. The suit here is brought upon both covenants; and both, in consequence of the total failure of the defendant's title and the eviction, have been broken. The plaintiff, accordingly, has a right to recover on both, but as the amount of the recovery would, according to my ideas, be the same on each, he must elect on which of them he means to rely, and take nominal damages on the other. The plaintiff is entitled to but one satisfaction, and he has his remedy on either of the covenants at his election to obtain it. It will hardly be said that he can have judgment for the same sum on both the covenants.

"But I consider the question arising in this cause as settled by authority, and that, according to established rules of law, the plaintiff is not entitled to any thing more than the value of the land as settled by the consideration in the deed.

"In suits upon the ancient covenant of warranty beyond all dispute, the recovery was restricted to the value of the land at the time of making the covenant.

"A personal action will not lie on the covenant of warranty upon eviction of the freehold, (Bac. Abr., tit. Cov. C.) and for which reason, upon the introduction of alienations by bargain and sale, new covenants were devised, but solely for the purpose of securing to the bargainers the personal responsibility of the bargainor in case of a failure of his title. I think I am warranted in saying that it never was designed, by the insertion of these covenants, to establish any other rule of damages than what previously existed, because there is nothing in the terms of the covenants from which an intention to extend the liability of the covenantor can be inferred, but the contrary is to be presumed, as not a single case is to be found where such a construction of these covenants, which were in a great measure substituted for the covenant of warranty, has ever obtained.

"If, then, on the covenant of warranty, the satisfaction recovered in land was to be equivalent to the value of the lands granted, as it existed at the time when the covenant was made, I do conceive that we are bound to adopt a correspondent rule, when satisfaction is sought to be recovered in money in a personal action, on the covenant for quiet enjoyment.

"Such a rule, moreover, I consider to be conformable to the intention of the parties. I question if one grantor out of ten thousand, enters into these covenants with the remotest belief, that he is exposing himself and his posterity to the ruinous consequences which would result from the doctrine contended for by the counsel for the plaintiff. By giving this doctrine our sanction, we should, in my apprehension, create a most unexpected and oppressive responsibility never contemplated by the parties, and inflict an equally unmerited punishment upon grantors acting with good faith, and having a perfect confidence in the validity of their title to the land, which they have transferred for what it is reasonably worth."

I have cited these cases at length, because they are leading



authorities on a very important branch of our subject. While we acquiesce in the doctrine, as far as regards increase of value resulting from accidental circumstances, we may be permitted to doubt as to the question of beneficial improvements.

The cases seem to have been mainly decided upon the analogy to the ancient real warranty, and the assumed impropriety of applying a different rule to the covenant of quiet enjoyment, from that which governs the covenant of seisin. But the rule adopted in regard to the real warranty was established when improvements were much more rare and far less rapid than at the present day ; and there seems no reason which forbids a grantor from giving a more effectual remedy against a prospective than an immediate failure of title ; nor is it easy to say why the price should be arbitrarily fixed on as the absolute measure of value in regard to lands, when in regard to chattels it is only *prima facie* evidence of that value.

There seems great doubt, too, whether sufficient attention has been paid to the words of the covenant. What is the meaning of the phrase "*quiet enjoyment*," in regard to a city lot, for instance, which is of no use but for buildings, on which erections must be contemplated at the time of purchase by both parties, and of which, without such erections, no *enjoyment* can be had ? May not a distinction be well taken between this covenant applied to such property and to farming land ?

We shall find, also, that in our sister states much diversity of opinion exists, though the rule is too well settled in New York to be shaken.\*

In the case above cited, [*Staats vs. Ten Eyck's Ex'ors*,] it had been said that the interest allowed should be commensurate with the legal claim to mesne profits. And in† an action brought by executors for a breach of the covenant of seisin, a verdict was taken by consent for the plaintiffs, for the conside-

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\* It may be noticed here that the revisers of the Statutes of New York proposed to fix the measure of damages for eviction, at the value of the premises at the time of *eviction*, with interest and costs, and reasonable expenses of defending the title. But if the consideration were paid in money, it was to be taken as the value of the premises ; and in case of partial eviction, the value of a part was to be estimated in proportion to the price paid for the whole. But this provision was not finally adopted. See the chapter on *Alienation by Deed*, (Part II., ch. 1, art. iv., R. S., vol. iii., 578,) which suffered sadly in the hands of the Legislature.

† *Bennet vs. Jenkins*, 13 J. R., 50.

ration money expressed in the deed, with interest from the date to the time of trial; but it appearing that the premises had been actually enjoyed, and the mesne profits taken by the grantee, they were only allowed six years' interest, and a deduction was accordingly made. And the principle of these decisions was affirmed in a subsequent case,\* where, in an action of covenant an eviction being proved, the plaintiff was only allowed to recover the consideration money paid, interest for six years thereon, and the costs of the eviction suit.

The general rule has been since repeatedly recognized in New York.† In a recent case,‡ the principle which we have seen settled in regard to conveyances, was applied to leases. The plaintiff declared on a lease upon an implied covenant for quiet enjoyment. The court held that no such covenant could be implied, but that if there were an express one, the tenant not having paid any purchase money on obtaining the lease, would be entitled to only nominal damages, and this although he had made valuable improvements on the premises, saying: "A lease where no purchase money is paid by the lessee, does not differ in principle in this respect from an ordinary conveyance in fee for a valuable consideration."

In a subsequent case,§ it seems to have been thought that under the covenant for quiet enjoyment, the lessee might, on eviction, recover the value of the lease, less the rent reserved; but by a still later decision,|| the arbitrary rule which, in regard to conveyances, as we have seen, takes the price paid to be the value of the land, was laid down in regard to leases, and Mr. Justice Bronson said:

"Following that analogy, the rents reserved in a lease where no other consideration is paid, must be regarded as a just equivalent for the use of the demised premises. The parties have agreed so to consider it. In case of eviction the rent ceases, and the lessee is relieved from a burden which must be deemed equal to the benefit which he would have derived from the continued

\* *Caulkins and others, Ex'rs of Albee, vs. Harris*, 9 J. R., 324.

† *Kane vs. Sanger*, 14 J. R., 89. *Baldwin vs. Munn*, 2 Wend., 399. *Dimmick vs. Lockwood*, 10 Wend., 149. *Kinney vs. Watts*, 14 Wend., 88. *Moak vs. Johnson*, 1 Hill, 99; and *Kelly vs. Dutch Church of Schenectady*, 2 Hill, 105, 106.

‡ *Kinney vs. Watts*, 14 Wend., 88.

§ *Moak vs. Johnson*, 1 Hill, 99.

|| *Kelly vs. the Dutch Church of Schenectady*, 2 Hill, 105.



enjoyment of the property. Having lost nothing, he can recover no damages. He is, however, entitled to the costs he has been put to; and as he is answerable to the true owner for the mesne profits of the land for a period not exceeding six years, he may recover back the rent he has paid during that time with the interest thereon. If this rule will not always afford a sufficient indemnity to the lessor, I can only say, as has often been said in relation to a purchaser, he should protect himself by requiring other covenants."

This rule destroys the value of all the usual covenants in leases, and is against the general principle in regard to chattels, by which we shall see that if a warranty in regard to them fails, the plaintiff is entitled to recover the difference between their actual value and that which they would have had, if the warranty had been complied with. It is very frequently the case, that the rent in leases, especially where ground rent for a long term is reserved, does not represent their real value to the lessee; that the lease, or its good will, as it is sometimes erroneously termed, is of great actual value; and that on an eviction the tenant must suffer positive loss. Why should a covenant, using the expressive phrase *quiet enjoyment*, be frittered away by an arbitrary assumption that the price paid was the real value?

The general rule, as settled in New York, in regard to conveyances, was adopted at an early day in Pennsylvania, and the price of the land at the date of the deed was taken as the measure of damages.\* But it does not appear by the case to what cause the increased value was to be ascribed.

It has been otherwise held in Massachusetts, Connecticut, Virginia and South Carolina.

In Massachusetts,† in a case in which the action was brought on the covenant of warranty, Parsons, J., delivering the judgment of the court, said, "The court were of opinion, conformably to the principles of law applied to personal actions of covenant broken, to the ancient usages of the State, and to the decisions of our predecessors, supported by the practice of the legislature, that the plaintiff in the action ought to recover in damages the value of the estate at the time of the eviction." The land in this case had risen from \$9,000 to \$15,000, but whether by reason of actual improvements is not stated.

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\* *Bender vs. Fromberger*, 4 Dall., 441.

† *Gore vs. Brazier*, 8 Mass., 528, 543. (Decided in 1807.) See, also, *Sumner vs. Williams*, 8 Mass., 222.

In a later case,\* it was held that, as there was a covenant of warranty in the deed, if the plaintiff had been evicted, the jury should consider the value of the land at the time of the eviction, as the proper measure of damages; but there being no eviction, it was held that the measure of damages on the covenant of seisin was the price paid, and interest.†

The rule as above established in Massachusetts, that where the covenant is in the future, and the estate in the mean time passes by force of the conveyance, and the grantor becomes seised, and is afterwards evicted by a paramount title, the value of the estate at the time of the eviction is the measure of the plaintiff's damages, has been repeatedly since held in that state.‡ But it has been recently said,§ that this rule may be modified by special circumstances; as, for instance, "a case may be supposed where an outstanding mortgage, though assuming the form of a paramount title, which if not redeemed would take the whole estate, and evict the covenantee, yet being very small in comparison with the value of the estate, it would be plainly for the interest of the owner and holder of the equity of redemption to redeem. In such case it would be quite unreasonable to hold that the covenantee in such an eviction should recover damages to the full value of the estate." And this doctrine has been recently re-affirmed.¶ It is to be borne in mind, that in Massachusetts the mortgagee obtains a conditional judgment, and is put in possession, after which the plaintiff may discharge the incumbrance, and restore himself to possession by paying the debt, with interest and costs of suit, and in such a case the proper rule of damages was held to be the amount due on the mortgage, with the costs of the mortgage suit against the plaintiff.¶

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\* *Caswell vs. Wendell*, 4 Mass., 108, (1808.)

† In 1807, (c. 75, § 3,) an act was passed in Massachusetts, allowing the tenant in real actions, in certain cases, compensation for his improvements, and giving the demandant the increased value of the premises, less the improvements, the provisions of which are incorporated in the Revision of 1836, 612. *Harris vs. Newell*, 8 Mass., 262. *Knox vs. Hook*, 12 Mass., 329. See, also, *Bacon vs. Callender*, 6 Mass., 308. *Runey vs. Edmonds*, 15 Mass., 291. *Shaw vs. Bradstreet*, 18 Mass., 241. *Chapel vs. Ball*, 17 Mass., 213. *Heath vs. Wells*, 5 Pick., 140. *The Society vs. Wheeler*, 2 Gallison, 105.

‡ *Norton vs. Babcock*, 2 Met., 510, 518.

§ *White vs. Whitney*, 8 Met., 81, 89.

| *Donahoe vs. Emery*, 9 Met., 63.

¶ *Tufts vs. Adams*, 8 Pick., 547.

The State of Maine has adhered to the rule of her parent, Massachusetts, that the value of the premises at the time of the eviction, form the necessary damages, and to this have there been added the expenses reasonably and actually incurred in the defence of the suit in which the grantee was evicted.\*

In Connecticut, as early as 1786, the same rule was declared.† The Superior Court said that in suits on the covenant of warranty, the constant rule of the court had been to ascertain damages by the value of the land at the time of eviction. But the action being on a covenant of seisin, this rule was held not to apply. It was said that the purchaser might bring his action immediately upon discovering that his title was defective, and the jury having computed the damages according to the consideration of the deed, the verdict was accepted by the court.

In the same State it was recently said, "We consider the rule to have been long since settled in this State, that upon the covenant of seisin the plaintiff has a right to recover the consideration money and interest, and on the covenant of warranty, the value of the land at the time of eviction. \* \*

We think, too, that when the warrantor has been vouched in to defend his title, the costs which the plaintiff has actually been put to is a fair ground of damages."‡

In South Carolina, the same rule was at first adopted.§ It was held at nisi prius, in an action of covenant brought for a breach of warranty in a release of a lot of land in Charleston, by Pendleton, J., "that there can be no doubt but that the measure of estimating damages in a case like the present, is the value of the land at the time of the eviction;" but only a part of the lot being taken, it was left to the jury to apportion the damages according to the amount of injury sustained, or give the full amount of the value of the lot, which latter was done. In a subsequent action of covenant on warranty,|| there was a difference of opinion on this point, Grimke, J., thinking the purchase money and interest was the true rule. But Waties and Bay, justices, thought the value of the lands at the

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\* Hardy *vs.* Nelson, 27 Maine, 525.

† Horsford *vs.* Wright, Kirby, 8.

‡ Sterling *vs.* Peet, 14 Conn. R., 245.

§ Liber et al. *vs.* Parson's Ex'rs, 1 Bay, 19, (1785.)

|| The Ex'rs of Guerard *vs.* Rivers, 1 Bay, 265. (1792.)

time of the eviction was the best general rule, and on this principle the verdict was given.

In an action of warranty of negroes,\* an attempt was made to apply the same principle to chattels, but while the general rule was acknowledged, the particular case was considered an exception, and the court left it to the jury to give what they thought reasonable. Finally, in a subsequent case, the prior decisions were distinctly overruled, and the New York rule was adopted.†

In New Hampshire, the rule of damages in the covenant of warranty, as to whether it should be the value of the land at the time of the purchase or of the eviction, was recently discussed but left unsettled.‡

In Virginia, it was very early said,§ that if a conveyance had been made with warranty, the value of the land at the time of eviction would fix the damages. This, however, was in equity; and the rule in that State seems to have been long involved in doubt. In a later case,|| while the rule as just stated was again recognized, it was held not to apply to a conveyance of land with a general warranty of a specific quantity when the quantity fell short, and the value of the deficiency was fixed at the time of the contract. In another case¶ the doctrine of the last decision was followed. But the rule we are considering does not appear to have controlled either of these cases, and more recently,\*\* the whole subject was carefully examined by Green and Coalter, justices, in able and conflicting opinions, but the case went off on another ground, Brooke, J., reserving his opinion. And the final decision seems to be that the purchase money, interest and costs of eviction, fix the measure of compensation.††

In Tennessee, the purchase money with interest makes the measure of remuneration.‡‡

\* *Eveleigh vs. Stitt's Adm'rs*, 1 Bay, 92. (1789.)

† *Hunning vs. Withers*, 2 Tred. Con. Rep., 584. *Ware vs. Weathnall*, 2 M'Cord's Rep., 418. *Bond vs. Quattlebaum*, 1 *ibid.*, 585, and Stat. of 1824. *Furman vs. Elmore*, 2 Nott & M'Cord.

‡ *Loomis vs. Bedel*, 11 N. H. R., 74.

§ *Mills vs. Bell*, 8 Call., 328. (1802.)

| *Nelson vs. Matthews*, 2 Hen. & Mun., 164. (1808.)

¶ *Humphreys Adm'r vs. Adams Adm'r*, 1 Mun., 493.

\*\* *Stout vs. Jackson*, 8 Randolph, 132. (1828.)

†† *Threlkeld vs. Fitzhugh*, 2 Leigh, 451.

‡‡ *Talbot vs. Bedford*, 5 Hall's Am. Law J., 380, cited in notes to *Duvall vs. Craig*,

So, too, in Kentucky, where it was held by the Court of Appeals, that in case of a covenant of warranty and eviction, "the value of the land at the time of sale to be ascertained by the purchase money, if expressed in the deed or known, together with interest thereon, and the costs extraordinary, as well as legal expenses in defence of the title, is the measure of damages to be recovered; but if the purchase money be not expressed in the deed, other means may be used to ascertain its value." The case was in chancery.\*

In Ohio, in actions on the covenants of seisin and quiet enjoyment, the measure of damages, as a general rule, has been adjudged to be the consideration money and interest; and this rule has been applied to suits on the warranty of title. But in that State, in an action on a covenant of warranty of title, where the plaintiff had occupied the premises from the date of the conveyance, the enjoyment was declared to be equivalent to the interest upon the consideration, and no interest as such to be recoverable. But as the plaintiff might be compelled to account for the rents and profits for *four years*, to the true owner, he

2 Wheat., 64, and Shaw *vs.* Wilkins, Adm'r, 8 Humphreys, 647. See, also, in Sumner *vs.* Williams, 4 Hall's Am. Law J., 129, 147, the opinion of Luther Martin.

\* Cox's Heirs *vs.* Strode, 2 Bibb, 278. These questions have been much considered in the various States of the Union, and the following cases may be noted. In North Carolina, Wilson *vs.* Forbes, 2 Dev. N. C. Rep., 80. In Kentucky, Seamore *vs.* Harlan, 8 Dana's Ken. Rep., 408, 415. Booker *vs.* Bell, 8 ib., 175. In Illinois, Buckmaster *vs.* Grundy, 1 Scammon's Rep., 812. M'Kee *vs.* Brandon, 2 ib., 389. In Maine, Swett *vs.* Patrick, 8 Fairf., 1. In Vermont, Strong *vs.* Shumway, D. Chipman's Rep., 110. Park *vs.* Bates, 12 Vermont Rep., 381. In Louisiana, Bissell *vs.* Erwin, 13 La. Rep., 148. In Tennessee, Talbot *vs.* Bedford, Cooke's Tenn. Rep., 447. Hopkins *vs.* Yowell, 5 Yerger, 805. In Virginia, Louther *vs.* Commonwealth, 1 H. & Munf., 202. Crenshaw *vs.* Smith, 5 Munf., 415. Wilson *vs.* Spencer, 11 Leigh, 261. In New Jersey, Stewart *vs.* Drake, 4 Halsted's Rep., 189. In Arkansas, Logan *vs.* Moulder, 1 Ark. R., 828. In Indiana, Blackwell *vs.* The Justices of Lawrence County, 1 Blackford's Ind. Rep., 266, *in notis.* Sheets *vs.* Andrews, 2 ib., 274. In Ohio, Adm'r of Backus *vs.* M'Coy, 8 Ham. Ohio, 221. Dustin *vs.* Newcomer, 8 Ohio, 49. Foote *vs.* Burnet, 10 Ohio, 817. "The ultimate extent," says Chancellor Kent, (vol. iv., 476,) to whose laborious research I am indebted for the authorities in this note, "of the vendor's responsibility under all or any of the usual covenants in the deed, is the purchase money with interest, and this I presume to be the prevalent rule throughout the United States." Supposing this to be so, subject to the above exceptions, it may still be doubted whether interest should be allowed in any case where the property has been enjoyed by the grantee, unless he has been actually compelled to pay the meane profits. Interest is given to counterbalance the claim of the true owner for meane profits; but even after eviction, the loss of the meane profits does not necessarily follow, and, as we have heretofore seen, the law does not give *actual compensation* for *probable loss*.—*Supra*, 108.

was held entitled to recover *interest* for four years in the suit on the covenant.\*

In the same State, where the covenant of warranty is broken by reason of an assignment of dower by metes and bounds, the damages will be not to the extent of the consideration money, or of one-third of the consideration money of the deed, but the extent to which the value of the estate is diminished by carving out the life estate, taking one-third of the consideration money to be the value of one-third of the fee simple interest.†

Where the eviction complained of is partial, the recovery is proportioned to the value of the part of the premises to which the title has failed. So in New York,‡ where action was brought on the covenant of seisin, the title to part of the premises having failed, and it was insisted, on the authority of an English case,§ that this partial failure of title gave the plaintiff a right to recover the entire purchase money. But the court held otherwise: that it was competent for the defendant to show that the part in regard to which the title had failed, was of inferior quality to the other portion conveyed; and that the true measure of damages was the value of the part of which the title had failed, taken in proportion to the price of the whole; the whole computation being on the basis of the consideration money. This rule was deduced by Kent, C. J., from the Year Books,|| and enforced by the analogies of the civil law. “*Quod enim*,” says Ulpian, “*si quod in agro pretiosissimum, hoc evictum est; aut quod fuit in agro vilissimum? æstimabitur loci qualitas, et sic erit regressus.*”¶ The same principle is also recognized by Pothier.\*\*

In a recent case in Massachusetts, it was contended that the damages should be determined by the proportion in quantity which the part to which the title had failed, bore to the residue; but the court said, “This is not a just rule, for the value may be unequal. The true and just rule is, that the proportional

\* Clark *vs.* Parr., 14 Ohio, 118.

† Johnson *vs.* Nye's Ex'rs, 17 Ohio, 66.

‡ Morris *vs.* Phelps, 5 J. R., 49; recognized in Guthrie *vs.* Pugsley, 12 J. R., 126.

§ Farrer *vs.* Nightingal, 2 Esp. Cas., 689.

|| 29 E. III., 4, and 18 E. IV., 8. See, also, Gray *vs.* Briscoe, Noy, 142, *supra*, 157.

¶ Dig., 21, 2 l. 1, l. 18, and l. 64, § 8.

\*\* Contrat de Vente, No. 99, 189, 142.

*value*, and not the *quantity*, of the several parts of the land should be the measure of damages.”\*

Assuming it to be settled that the consideration paid furnishes the rule of damages, it still remains to be seen how far the price named as paid and received in the deed, is conclusive proof of that consideration. In England, the cases are conflicting, and the rule appears to be against the admission of parol proof to contradict the deed.† In a recent case,‡ the Court of King’s Bench said: “The deed states the whole purchase money to be well and truly paid. The parol evidence is that it never was paid, but a great part of it kept back, and that fact is wholly inconsistent with the statement in the deed, and, therefore, ought not to have been received in evidence.” But it seems to be well settled in this country, that, as between the original parties to the transfer, the consideration clause is open to parol proof,§ at least so far as to permit the grantor to show that the price of the property was not, in point of fact, paid.

But however the rule may be in general, there may again arise a question whether the consideration clause is open to parol proof, for the purpose of reducing or enhancing the damages; as, for instance, if a mere nominal consideration be inserted, will that defeat all but a nominal recovery, or can the party evicted show the actual price paid? A very accomplished judge has held this language:¶ “Where the deed contains no covenant but that of seisin or general warranty, the consideration is not inserted as a mere matter of form, nor for the sole

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\* *Cornell vs. Jackson*, 3 Cush., 506. See, also, in Ohio, *Michael vs. Mills*, 17 Ohio, 601.

† *King vs. Inhabitants of Scammonden*, 8 T. R., 474. *Rowntree vs. Jacob*, 2 Taunt., 141. *Villers vs. Beaumont*, 2 Dy., 146 a. *Mildmay’s Case*, 1 Rep., 176. *Vernon’s Case*, 4 Rep., 8. *Peacock vs. Monk*, 1 Ves. sen., 128. *Craythorne vs. Swinbourne*, 14 Ves., 159. *Lampon vs. Corke*, 5 Barn. & Ald., 606.

‡ *Baker vs. Dewey*, 1 Barn. & Cres., 704.

§ See the English and American cases elaborately reviewed in the Court of Errors in New York, in *McCrea vs. Purnort*, 16 Wend., 460. See, also, *Grant vs. Townsend*, 2 Hill, 557. In New Jersey, see the subject examined in *Bolles vs. Beach*, 2 Zabriskie, 680, where it is said, “when the deed acknowledges the payment of the consideration, it cannot be denied by the grantor, for the purpose of destroying the effect and operation of the deed, though it may be denied for the purpose of recovering the consideration money. This doctrine is now, in this Court, supported by such a weight of authority as not readily to be disturbed.”

¶ *Greenvault vs. Davis*, 4 Hill, 648, per Bronson, J.



purpose of giving effect and operation to the deed ; but it is inserted for the further purpose of fixing the amount of damages to which the grantee will be entitled, in case he is evicted. At least, such are my present impressions, though my brethren are inclined to a different conclusion. But it is not now necessary to decide the question."

I submit, however, with deference, that any distinction, as to the purpose for which parol proof is admitted, cannot be maintained. If good for one end, it must be good as to all. It would be a solecism for the tribunal to admit evidence to influence their minds as to one result, and to exclude it as to another. If a fact be established, all its legitimate results must follow, whether as to rights or remedies ; and so it seems to be now at length definitively settled in New York. In a recent case, Jewett, J., delivering the opinion of the Court of Appeals, said, "It is well settled that for the purpose of ascertaining the damages to which a plaintiff may be entitled in an action at law for the breach of the covenant of seisin in a deed, the true consideration, and that all, or any part, remains unpaid, may be shown, notwithstanding a different consideration is expressed in the deed, and although it contains an acknowledgment, on the part of the grantor, that it has been paid at the time of, or before the execution of the deed."\* In the sister states of the Union, also, it seems to be now generally held that parol proof is admissible as to the quantum of consideration paid.†

But, though parol proof may be admitted as between the original parties, it is well settled in New York, that if the grantee has transferred the land, the consideration named is conclusive as between his assigns and the original grantor, at least as against the latter. In a case already cited,‡ Bronson, J., said : "It would work the grossest injustice to allow the covenantor to go into the question of how much was actually paid for the land, when the title has failed in the hands of an assignee." In this case it was held the *grantor* could not be allowed, as against the assignee, to show that the price paid was less than that

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\* Bingham *vs.* Weiderwax, 1 Comstock, 509.

† Garrett *vs.* Stuart, 1 M'Cord, 514. Bullard *vs.* Briggs, 7 Pick., 523. Morse *vs.* Shattuck, 4 N. Hamp. R., 229. Belden *vs.* Seymour, 8 Conn. R., 804.

‡ Greenvault *vs.* Davis, 4 Hill, 643, 649.



named in the deed; but perhaps the same reasons do not apply against the *assignee*, if desirous to prove the price greater.

In regard to all the real covenants, although the courts have felt themselves bound to adopt the arbitrary rules, which we have stated, as to the price paid, still the constant effort is to give compensation for what is actually lost; not to allow any remuneration for a mere technical breach of agreement, to make the measure of damages correspond with the real injury sustained, and not to permit an action where no loss has been suffered. So in Massachusetts, it has been held that "the grantee of land with warranty, who has conveyed all his interest therein with warranty, cannot maintain an action against his grantor for a breach of the warranty, subsequently occurring, unless he is compelled to pay damage on his own covenant of warranty or obtains a release of the same from his grantee, and the court said, "the plaintiff has not suffered any damage, and he may never sustain any. He is liable on his warranty, it is true, but before he has suffered he cannot sue for indemnity, there being no certainty that he ever will be damnified."\* So, in an action on this covenant in New York, where the plaintiff had been ousted of a portion of the premises by a third party, who had a superior title, but for a term of years only, it was held by the Supreme court that the measure of damages was not the consideration money and interest of the land of which the plaintiff was dispossessed, but the annual value thereof, or the interest of the consideration money paid for the land for the period of the term; and that the costs and counsel fees of the plaintiff's defence to the termor's suit, were all properly included.† In Massachusetts, in a similar case, we have already seen that counsel fees were not allowed.‡

In New Hampshire, it appears to be well settled, that in a suit brought on the covenant of warranty, where the grantee has purchased in the paramount title, he can recover no more than the amount paid, with compensation for his trouble and expenses.§

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\* *Wheeler vs. Sohler*, 8 Cush., 219.

† *Rickert vs. Snyder*, 9 Wend., 416. See this case commented on in *Batchelder vs. Sturgis*, 8 Cush., 201, where the Supreme Court of Massachusetts say they are not prepared entirely to adopt it.

‡ *Supra*, 98, et seq.

§ *Loomis vs. Bedel*, 11 N. H. R., 74. Vide *supra*, 55.

Having thus examined the covenants of warranty and for quiet enjoyment, we come next to that of seisin, or that the grantor has good right to convey, for they are substantially the same.

In regard to this covenant, it is not necessary to allege by way of breach, an ouster or eviction. All that is requisite is to negative the words of the covenant.\* If, at the time of the execution of the deed, the grantor does not own the land, the covenant is broken, as we have seen, immediately; and in such a case, in Massachusetts, it was said:† “The rule for assessing the damages arising from this breach, is very clear. No land passing by the defendant’s deed to the plaintiff, he has lost no land by the breach of this covenant; he has lost only the consideration he paid for it. This he is entitled to recover back, with interest to this time.”‡ In New York,§ in an action for the breach of this covenant, it appeared that there was only a partial failure: the grantors having the fee in two-sixths of the premises conveyed, and a life estate in the remainder. The court said: “There is no settled rule of law to ascertain the damages in such a case, without having a jury to assess them, as they must depend principally upon the value of the estate during the lives of the defendants, which must be deducted from four-sixths of the consideration money. Nor ought interest to be allowed during their lives; for no one, during that time, will have a right to turn the plaintiff out of possession, or call on him for the mesne profits.”

In New Hampshire, in an action on the covenants of seisin in fee and right to convey, it was said, that “the two covenants were synonymous, and each amounts only to a stipulation that the grantee has such a seisin, that the land will pass by the deed.”¶ And the court proceeded to say, “It has been settled in this State too long to be now questioned, (and it is deeply to

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\* Rickert *vs.* Snyder, 9 Wend., 416. Kent’s Com., vol. iv., 479.

† Bickford *vs.* Page, 2 Mass., 455, 461.

‡ See, to the same point, Caswell *vs.* Wendell, 4 Mass., 108. Chapel *vs.* Bull, 17 Mass., 218. Jenkins *vs.* Hopkins, 8 Pick., 346.

§ Guthrie *vs.* Pugaley, 12 J. R., 126.

¶ This, however, is not absolutely true; for if husband and wife convey with covenants of seisin, and of right to convey, and they are seised in fee, but the wife is under age, the one covenant would be broken and the other not. Sugden, Vend. & Purch., 404, 406.

he regretted that it is so settled,) that he who has a good title to land which is in the adverse possession of another, has, so long as he has a right of entry, such a seisin, that the land will pass by his deed."\*

The general rule on the covenant of seisin undoubtedly is, that the vendee recovers his consideration money and interest, upon the ground that this is his actual loss. But where it is apparent that his loss has been really less, he is limited to the amount of injury sustained. So in Maine, where land was conveyed with covenant of seisin, and it appeared that, at the time of the conveyance, there was an outstanding paramount title, and, about seventeen years after the purchase, the plaintiff, who had been all the time in possession, was obliged to purchase in the outstanding title, it was held that he was not entitled to recover the whole original consideration money with interest, but only the amount paid to perfect the title, with interest from the time of payment. In this case, it was urged that the plaintiff derived no rents or profits from the premises; but the court said, "We think that cannot be taken into consideration to affect the rights of the parties. If a person purchases real estate, it is to be presumed that he does so because the rents and profits of it will be equivalent to the interest of the money he may be content to pay for it. Whether the vendee turns his purchase to a profit or a loss, is no concern of the vendors."†

So, also, in New York, where the defendant, being tenant for life, with remainder over, conveyed with covenant of seisin in fee, in a suit on this covenant, the plaintiff, having been in possession from the time of the conveyance, was allowed to recover the consideration money without interest, deducting therefrom the value of the life estate.‡

So in Maine, in an action on this covenant it appeared that the grantor was not seised at the time of execution of the deed,

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\* Willard *vs.* Twitchell, 1 N. H. R., 777.

† Spring *vs.* Chase, 22 Maine, 502.

‡ Tanner *vs.* Livingston, 12 Wend., 88. In Spring *vs.* Chase, 22 Maine, 501, it is said, speaking of this case, "to have been held," that interest was not recoverable, but there was no discussion nor decision as to the matter of interest: it was the ruling at the trial; the tenant for life, however, not having died, and the plaintiff not being evicted, there was evidently no ground for any allowance of interest, which is only given to cover the value of the *meane profits* that it is supposed the grantee may be obliged to refund to the true owners.

and the covenant was therefore broken ; but that he had subsequently acquired a title which was held to enure to the grantee by estoppel, and the grantee not having been disturbed in his possession, it was considered that the plaintiff could recover nominal damages only, and the Supreme Court said :

"The rules which have been established to determine the measure of damages, upon the breach of covenants in deeds for the conveyance of real estate, have been framed with a view to give the party entitled a fair indemnity for the damages he has sustained. Thus, if the covenant of seisin is broken, as thereby the title wholly fails, the law restores to the purchaser the consideration paid, which is the agreed value of the land, with interest. But in this, as well as in other covenants usual in the conveyance of real estate, if there exist facts or circumstances which would render the application of the rule inequitable, they are to be taken into consideration by a jury. The covenant was intended to secure to the plaintiff a legal seisin in the land conveyed. If it is broken, and he falls of that seisin, he has a right to reclaim the purchase money. But if in virtue of another covenant in the same deed, which was also taken to assure to him the subject matter of the conveyance, he has obtained that seisin, it would be altogether inequitable that he should have the seisin, and be allowed besides to recover back the consideration paid for it."\*

But a release of land without warranty to a third person has been held in Massachusetts not to prevent a grantee from recovering full damages against his grantor for a breach of the covenant of seisin.†

If the grantor on a deed containing covenants of seisin and warranty, after the execution of the deed, recover land included in it of which he was not in fact seised at the time of making the deed, it will go to reduce the damages pro tanto.‡

It has been frequently decided in actions on this covenant, that where a former suit has taken place which the covenantee has been obliged to defend, not only his costs, but his counsel fees may be recovered in the proceeding on the covenant itself.§

Where the breach of the covenant consists of an outstanding life estate, it has been held not to be erroneous to give the

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\* *Baxter vs. Bradbury*, 20 Maine, 260. See, also, *Whiting vs. Dewey*, 15 Pick., 428.

† *Cornell vs. Jackson*, 8 Cush., 506.

‡ *Cornell vs. Jackson*, 8 Cush., 506.

§ *Staats vs. Ex'rs of Ten Eyck*, 8 Cames R., 111. *Kingsbury vs. Smith*, 18 N. H. R., 122. *Swett vs. Patrick*, 12 Maine, 9. *Beale vs. Thompson*, 8 B. & P., 407. *Pitkin vs. Leavitt*, 18 Verm. R., 379. *Allen vs. Blunt*, 2 Woodb. & M., 121.

jury printed tables to compute its value by, as, in Vermont, those of Dr. Wigglesworth.\*

We proceed now to consider the rule in regard to the covenant against incumbrances.

And on this subject the Supreme Court of Massachusetts has used this general language, that the defendant is to make good his warranty; that is, he is to pay a sum of money which will put the plaintiff in as good a state as if he had kept his covenant.† The cases arising under the covenant against incumbrances resolve themselves into three general heads. *First*, where the incumbrance consists of a mortgage or other debt which is already due and which the plaintiff has paid off. *Second*, where the plaintiff has not discharged the incumbrance, though it might have been done. *Third*, where the incumbrance consists of a mortgage or lease not expired, or servitude of any description, which the plaintiff cannot discharge. In Massachusetts the general rule has been laid down as follows: "If the covenantee has fairly extinguished the incumbrances, he ought to recover the expences necessarily incurred in doing it. If they remain and consist of mortgages or attachments, and such liens on the estate as do not interfere with the enjoyment of it by the covenantee, he can only recover nominal damages. But if they are of a permanent nature, and such as the covenantee cannot remove, he should recover a just compensation for the real injury resulting from their continuance."‡ And this seems the law as generally received.

So in New York,§ it was held, that if the plaintiff had actually extinguished the incumbrance, he was entitled to recover the amount so paid; but if not extinguished, that then he could only recover nominal damages; and the doctrine has been uniformly adhered to in that state.¶ And on the same principle, in regard to the mode in which the breach of this covenant must be set out, it is held in New York,|| not to be sufficient to aver that the premises are not unincumbered, but that the plaintiff must allege the extinguishment of the incumbrance.

\* *Mills vs. Catlin*, 22 Verm., 98.

† *Thayer vs. Clarence*, 22 Pick., 490.

‡ *Harlow vs. Thomas*, 15 Pick., 66, 69. *Batchelder vs. Sturges*, 8 Cush., 200.

§ *Delavergne vs. Norris*, 7 J. R., 858.

|| *Hall vs. Dean*, 13 J. R., 105. *Stanard vs. Eldridge*, 16 J. R., 254.

¶ *Deforest vs. Leete*, 16 J. R., 122.

So in Massachusetts, in an early case, *Parsons, Ch. J.*, said: "A purchaser from one seised is not obliged to wait in painful suspense until he be evicted, before he can obtain an adequate remedy; but as soon as he can extinguish the incumbrance, he may call on his grantor for an indemnity." So held again in the same state, that the damages in a suit on the covenant against incumbrances, are merely nominal, if the plaintiff has paid nothing towards their discharge.\* So in Maine, it has been decided that the plaintiff can recover nothing more than nominal damages for a breach of covenant by an incumbrance no longer existing, and not removed at as his expense.†

In New York,‡ in an action on this covenant, the plaintiff having been defeated in an ejectment suit, and judgment obtained against him, the Supreme Court held that he was entitled to recover the consideration named in his deed, with interest, and also the costs of the proceeding in which he was evicted.

In Massachusetts, where the grantee was evicted under a paramount title, it was held that the proper measure of damages was the value of the land, with interest thereon from the time of the eviction.§

In New York, the following question was raised. Suit was brought on the covenant against incumbrances; the declaration averred that the plaintiff purchased the land in question for two hundred and fifty dollars, and put on improvements to the value of two thousand dollars: that at the time of the deed, the premises were not free from incumbrances, but that they were subject to a judgment for upwards of three thousand dollars on an undivided moiety of the lot, under which incumbrance one-half was sold. Plea, that the plaintiff was only entitled to recover one hundred and twenty-five dollars, one-half of the consideration money paid, and tender of that sum: demurrer and joinder. This plea proceeded on the ground, that under the covenant against incumbrances the plaintiff can only recover

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\* *Prescott vs. Truman*, 4 Mass., 627. *Wyman vs. Ballard*, 12 Mass., 804; and *Tuft vs. Adams*, 8 Pick., 547.

† *Herriek vs. Moore*, 19 Maine, 818.

‡ *Waldo vs. Long*, 7 J. R., 178.

§ *Barrett vs. Porter*, 14 Mass., 148.

| *Dimmick vs. Lockwood*, 10 Wend., 142.

the consideration paid, and nothing for his improvements. So the court held, and gave judgment for the defendant. It was even intimated that if he had discharged the incumbrance, he could not recover the amount paid. "Suppose the plaintiff," said Savage, C. J., "instead of building a house, had paid the \$3,000, and brought this suit to be reimbursed, he would bring himself within the language of some of the judges who say that a purchaser is entitled to recover what he has paid, and yet I apprehend he would not be permitted to recover that amount." The court laid stress on the admitted fact, that under the covenant of quiet enjoyment, only the consideration money and interest could be recovered, and asked why more should be obtained in the action before them.

This case appears open to much observation; it may not be contrary to the spirit of the rule in regard to the covenant for quiet enjoyment, but if generally applied, it appears greatly to diminish the value of the covenant against incumbrances. By surrendering the property to the previous incumbrance, a valid claim may always be created to the extent of the consideration money, and to this it seems the recovery under this covenant is in every instance to be limited. A case may, however, easily be imagined, where the incumbrance is well known, where the consideration money is a fair representative of the value without the incumbrance, where the grantor agrees to remove it, and the covenant against incumbrances is inserted for the express purpose of making it certain that he will do so. In such a case the application of this principle would be extremely inequitable. For it must not be forgotten that the severity of the arbitrary rule which declares the consideration named in the deed to be the actual price paid, is but little mitigated by the permission given to the parties to contradict it by parol proof. Such evidence, after the lapse of a few years, will generally be difficult of production, in many cases impossible, and the mere burthen of proof is always a serious responsibility. In Massachusetts, also, it has been said, that the general rule that the covenantor against incumbrances is liable to refund the sum paid by the grantee to extinguish the incumbrance, must be taken subject to the qualification that the amount thus paid does not exceed that which the grantor would be bound to be paid in case of eviction. In other words,



he cannot be made liable for more than the value of the estate. But this, it will be observed, where that value is fixed by the consideration money paid, as in New York, becomes a very different rule in its effect when the actual value at the time of eviction is taken as in Massachusetts. In this latter case there appears no objection to it.\*

In Massachusetts, in an action on the covenant against incumbrances, and of warranty,† there was proved a deed by defendants to plaintiffs; that in the conveyance to the defendants, the land was supposed to be embraced, but it was not; that subsequent to the conveyance by defendants to plaintiffs, the original owners entered, and plaintiffs surrendered, and afterwards paid divers sums to extinguish the original title. The plaintiffs claimed the sums paid to extinguish the adverse titles, with charges for their time spent in extinguishing them, incidental expenses for horse and carriage hire, and sums paid for advice of counsel after suit brought. The latter item (counsel fees) was disallowed, but the other expenses, subsequent to the service of the writ, were allowed.

In New Hampshire, in an action brought on the covenant against incumbrances, the breach being the existence of a highway, to contest which the plaintiff, induced by the representations of the defendant, had brought a suit and been defeated, it was held that the jury *might* include the costs of that suit in the damages.‡

In Maine, it has been decided in a suit on the covenant against incumbrances, that the plaintiff may recover the amount paid by him to free the title, although so paid after suit brought.§ And so it has been held in Massachusetts;|| and in both States no doubt on the correct ground, that the cause of action accruing before the commencement of the suit by reason of the existence of the incumbrance, and thus a claim for nominal damages being created, the payment of the incum-

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\* Norton *vs.* Babcock, 2 Met., 510 and 516.

† Leffingwell *vs.* Elliott, 10 Pick., 204.

‡ Haynes *vs.* Stevens, 11 N. H. R., 282. Would it not have been more proper to say that these costs *should* have been included?

§ Kelly *vs.* Low, 18 Maine, 244.

|| Leffingwell *vs.* Elliott, 10 Pick., 204. Brooks *vs.* Wood, 20 Pick., 474; *supra*, 109.



brance was mere matter of consequence, which the jury should take into consideration.

The most difficult questions as to the measure of compensation on this covenant, arise under the third head; where the incumbrances are still outstanding. In New York it has been held, that where the covenant has been broken by reason of an unexpired lease, the rule of damages is the annual value of the estate, or the annual interest on the purchase money.\* The Supreme Court of Massachusetts, while refusing to adopt this as a general rule, have said that in some instances it may be correct, and in case of a lease outstanding, they have said, "That the effect of such a lease *on the sale of the estate* could not be taken as the true rule; that such effect must in its very nature be imaginary, and supported only by speculative opinions and conjectures;" and that "it was quite too loose and uncertain a mode of estimating damages. Nor will, in such a case, the fact that the estate was purchased by the grantee for resale, be allowed to be proved in order to augment the damages, unless this was known to the grantor.†

Instead of the general covenant that the premises conveyed are free from incumbrances, we sometimes find a special agreement to remove certain existing incumbrances, and in such a case in England it has been held that the amount of the incumbrance becomes the measure of damages. So in an action by the trustees of the defendant's wife on a covenant to pay off certain incumbrances to the amount of £19,000, no special damage was laid in the declaration, nor proved, and judgment having gone by default, the sheriff's jury gave only nominal damages; but on motion the inquisition was set aside, Lord Tenterden, C. J., saying: "if the plaintiffs are only to recover a shilling damages, the covenant becomes of no value," and Patterson, J., said, "at law, the trustees were entitled to have this estate unincumbered. How could that be enforced unless they could recover the whole amount of the incumbrances, in an action on the covenant?"‡

I have already ventured to suggest,§ that the verdict in

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\* *Rickett vs. Sneider*, 9 Wend., 428.

† *Batchelder vs. Sturgis*, 8 Cush., 200.

‡ *Lethbridge vs. Mytton*, 2 B. & Adol., 772.

§ *Supra*, 109.

such a case should be for nominal damages only. And so, I apprehend, it would certainly be held in this country, in conformity to those general rules fixing the measure of damages upon this covenant which we have above considered.

In Maine, where a covenant was given to pay, or allow in account a certain sum, provided certain incumbrances were removed by a given day, and they were removed, but not till a year afterwards, it was held, that such deduction must be made from the stipulated sum as any change that had in the interim taken place in the value of the property might render just and proper.\* In Pennsylvania it is held,† that if vendee covenant to pay an incumbrance out of the purchase money, and fail to do so, by reason of which the land is sold for the payment of the incumbrance, and sells for a price exceeding it, he is liable to the vendor for damages, the measure for which is the difference between the amount for which the land is sold, and the price which he agreed to pay for it.

We shall be obliged to discuss in a separate place, the rule of damages in regard to covenants generally; but this appears the proper time to examine the measure of compensation in regard to contracts to convey or purchase real estate or any interest therein.

These agreements, usually under seal, may be broken either by the vendor refusing to convey, or by the vendee refusing to pay the price. *First*, where the vendor refuses or is unable to convey. We have already had occasion to notice a case of this kind where all profit for the loss of the bargain was denied and the vendee's damages limited to his deposit.‡ This would of course, if the vendee made no advance, reduce his recovery, independent of actual expenses, to a merely nominal sum. That case seems to have gone on the ground, that "contracts of this description, are on the condition frequently expressed, but always implied, that the vendor has a good title." And as to such cases the principle seems well settled; so in a more recent case, where the vendor acting in good faith, contracted with the plaintiff to sell certain real estate, and proved unable to give a good title, the plaintiff was permitted to recover

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\* *Roberts vs. Marston*, 20 Maine, 275.

† *Young vs. Store*, 4 Watts & Serg., 45.

‡ *Flureau vs. Thornhill*, 2 W. Bl., 1078.

only his expenses for investigating the title and not the advance at which he could have sold the property, Parke J., saying, "In the absence of any express stipulation the parties must be considered as content that the damage in the event of the title proving defective, shall be measured in the ordinary way, and that excludes the claim of damages on account of the supposed goodness of the bargain."\*

And these cases have recently been reviewed and adhered to. So, where the plaintiff entered into possession of premises as tenant for two years, with liberty to make improvements, (which he did,) and to purchase at the end of the ten years, the purchaser having acted in good faith, but proving unable to complete, the plaintiff claimed to recover for the improvements he had made, but it was held, he was only entitled to the value of the lease, and not of the improvements.†

But where the vendor has no title whatever, and holds himself out as the proprietor when he is not, the rule is otherwise. So, where the vendor had no title whatever, although acting *bona fide*, the Court of King's Bench permitted substantial damages to be given.‡ And again, where a party agreed to grant a lease, with full knowledge that he had no title, the plaintiff was allowed damages for the loss of his bargain.§

It has been supposed that the plaintiff in an action against the vendor in default might include the costs of a suit in equity, to compel specific performance, the bill having been dismissed without costs, as is the practice of the English Court of Chancery when the defendant cannot make a title. But the Court of Queen's Bench has recently held that these damages are too remote.||

The same distinction, growing out of the motives influencing the vendee, has been taken in this county. So in a case in New York,¶ in which the covenantor had acted in good faith, and re-

\* Walker *vs.* Moore, 10 B. & Cres., 416.

† Worthington *vs.* Warrington, 8 Man. Gr. & S., 183.

‡ Hopkins *vs.* Grazebrook, 6 Barn. & Cres., 31.

§ Robinson *vs.* Harman, 1 Exch. R., 850. See, to same point, Betner *vs.* Brough, 11 Penn. R., 127. See Tyrer *vs.* King, 2 Car. & Kir., 149, where damages for loss of bargain refused.

| Malden *vs.* Fyson, 11 Q. B. R., 293. See Jones *vs.* Dyke, Appendix to Sugden on Vendors, 1078.

¶ Baldwin *vs.* Munn, 2 Wend., 399.

fused to convey because his title had in part failed, the plaintiff insisted that he was entitled to recover the increased value of the land on the day when the deed was due beyond the contract price. It was held, that where the vendor acted *in bad faith* the plaintiff would be entitled to recover, by way of damages, the difference between the contract price and the enhanced value when the conveyance should have been made; but that in a case of *good faith*, the contract price would be considered conclusive, and the plaintiff having paid nothing could recover nothing.

In this decision the court proceeded on the analogy of eviction, where the plaintiff is, as we have seen, limited to the consideration paid, and disregarded the authorities in regard to chattels, where it is well settled, as we shall see, that the plaintiff is entitled to recover the enhanced value without being driven to any investigation into the good or bad faith of the vendor.\*

And to this the Courts of New York have adhered. So in a recent case the defendant in consequence of a defect in his title failed to comply with his contract to convey certain property, the plaintiff who was to pay on the delivery of the deed had advanced nothing, but he had removed to the property and done some work on it; and in the declaration he claimed to recover his expenses of removing and also his labor. No bad faith was alleged or pretended. The judge, who tried the cause, told the jury that if the defendant *wilfully* and *designedly* neglected to convey, the plaintiff was entitled to recover *all the damages* which he had sustained by the breach of his contract; but that unless the non-performance was wilful and intentional, the plaintiff was entitled to *nominal damages* only; that if the omission to convey was accidental or inadvertent, and the defendant had fairly tendered him all the title he could make, the plaintiff could not recover any of the special damages.

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\* The language of the court was as follows: "If the vendor acts in bad faith, and refuses to convey because the property has increased in value and with a view of putting the enhanced value in his own pocket, it becomes a case of fraud, and the plaintiff would clearly be entitled either to compel a specific performance in equity, or to recover by way of damages the difference between the contract price and the enhanced value when the conveyance should have been made." We shall, however, hereafter, when we come to the subject of contracts generally, consider the propriety of this suggestion, that in an action on contract damages will vary according to the intention of the party.

A verdict was found for nominal damages, and on exceptions, this was held right, the Court saying: "that on an executory contract for the sale of lands which the vendor believes to be his own, and where there is no fraud on his part, if the sale falls through in consequence of a defect of title, the measure of damages is substantially the same as it is in the case of an executed sale," or on the covenants for seisin and for quiet enjoyment.\* .

But the Supreme Court of the United States have disregarded the analogies deducible from the actions on real covenants and have resorted to those to be derived from executory contracts for the sale of chattels. In a case somewhat similar to the last, the following language was held by that high tribunal :†

"The rule is settled in this court, that in an action by the vendee for a breach of contract on the part of the vendor for not delivering the article, the measure of damages is its price at the time of its breach. The price being settled by the contract, which is generally the case, makes no difference, nor ought it to make any; otherwise the vendor, if the article have risen in value, would always have it in his power to discharge himself from his contract, and put the enhanced value in his own pocket; nor can it make any difference in principle whether the contract be for real or personal property, if the lands, as is the case here, have not been improved or built on. In both cases the vendee is entitled to have the thing agreed for at the contract price, and to sell it himself at its increased value. If it be withheld, the owner ought to make good to him the difference. This is not an action for eviction."‡

In Virginia, in general upon the breach of an executory contract to convey land, the vendee is not entitled to more damages than the purchase money actually paid and interest thereon.§ But this rule will not be applied when the fraudulent conduct of the vendor makes it unreasonable to limit the vendee to that measure of damages. If, for example, a vendor who has the title in him at the time of sale, shall after his contract disable

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\* *Peters vs. M'Keon*, 4 Denio, 546. See the authorities collected and referred to in a recent case; *Fletcher vs. Button*, 6 Barb. S. C. R., 646.

† *Hopkins vs. Lee*, 6 Wheaton, 109, 118.

‡ In *Baldwin vs. Munn*, 2 Wend., 899, 407, speaking of this case, Sutherland, J., said, "It will be perceived that this was substantially a case of exchange of lands. Very different considerations may be applicable to such a case from the ordinary case of a mere failure to convey where the consideration money has not been paid."

§ *Thompson's Ex'rs vs. Guthrie's Adm'r*, 9 Leigh, 111.

himself from performing it by conveying the land to another, he will be held liable for the value at the time of the breach, and interest may be allowed on such value for that time.\*

In Kentucky it is held by the Court of Appeals, that on a covenant to convey, where the vendor is *without fraud* incapable of making a title, the rule of damages is the purchase money, with interest from the time it was paid, and the court approved the English case of *Flureau v. Thornhill*.† But in the same state, in a case where the vendor fraudulently sold land, to which he knew he had neither a good title nor claim, it was held by the Court of Appeals in *equity* that the value of the land should be fixed at what it was worth at the time of impanelling the jury.‡

And again, in the same State, in an action on a covenant to convey land, the jury were told that if they found for the plaintiff, they must give the value of the land at the time it should have been conveyed, and interest. But, on review, this was held erroneous, and the Court of Appeals said, "when there is a fraudulent refusal to convey, less damages than the value of the land, at the time the conveyance ought to have been made, should never be given, and the jury would, no doubt, be at liberty to find damages equivalent to the value and interest down to the assessment. But in such a case, the giving or withholding interest, is a matter in the discretion of the jury, and consequently, instead of instructing the jury as a matter of law to give interest, the court should have left them to exercise their discretion free from any intimation of opinion."§

In these cases it will be noticed, that the courts have recognized a difference in the rule of damages, growing out of the motives of the party in default. This distinction has crept in from the civil law without, as I believe, sufficient consideration being given to the point. There may be room for the suggestion in equity, on a bill filed for performance or for general relief. But when I come to consider the rule of damages on contracts generally, I think I shall be able to prove, that at law

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\* *Wilson vs. Spencer*, 11 Leigh, 261.

† 2 W. Black., 1078. *Allen vs. Anderson*, 2 Bibb, 415.

‡ *McConnell vs. Dunlop*, Hardin, 41. And the principle was recognized in *Patrick vs. Marshall*, 2 Bibb, 40; and *Fisher's Heirs vs. Kay*, 2 Bibb, 484. These are all in *equity*, however.

§ *Handley vs. Chambers*, 1 Littell's Rep., 858.

the motive of the party can never be taken into consideration in an action of contract; that the intent cannot be averred in pleading except as matter of form, nor evidence given in regard to it; and that consequently the damages cannot be made to depend upon it.\*

In Maine, in an action by the vendee on an agreement to convey land, it has been held that the jury are not confined to the value of the land for agricultural or pastoral or other useful purposes, nor to be controlled by the probability that the land would be in demand for building lots; but that they might take into consideration *the marketable value* also at the time; and that their result should be arrived at by taking into view all the objects for which the land is desirable.†

In the same State, in an action brought by the vendee of land who had paid the purchase money, and received a bond conditioned to execute a deed of the premises at a reasonable time after request, the jury were instructed at the trial,

“That the rights of the parties must be determined by the state of the facts at the time the action was brought, and that all subsequent proceedings might be laid out of the case; that the obligation of the defendants required them to convey the title to the land disputed; that if they had not complied with it, the injury to the plaintiff was the loss of the title to the land; and that the proper and legal compensation was the value of the land at the time of a demand made and a refusal or neglect to perform; and that in finding that value they ought to take into consideration the price agreed by the parties, and such other evidence as there was in the case.”

Under this charge the jury found a verdict for the consideration money and interest. A motion was made to set it aside for misdirection, but the court said:

“When a party has a covenant for a title, he may in a proper case, if the other party can perform, obtain a specific performance in Chancery. If the

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\* *Newson vs. Harris*, Dudley's Georgia Reports, August, 1832, 180. In an action on a bond to make titles to land, a breach was proved, and the question was as to the measure of *damages*. The plaintiff gave three hundred dollars for the land, and the defendant sold it for six hundred dollars. The verdict was for the price paid for the land by plaintiff, and the question argued was, whether the price paid with interest or the value at the time of the breach, were the true measure of damage. The Court adopted the latter rule, and set aside the verdict.

† *Warren vs. Wheeler*, 21 Maine, 484. The action was *assumpsit*, being on an unsealed agreement.



other party cannot perform, he must be content with his remedy at law. If he elect to proceed at law, and recovers damages, that is a satisfaction of the contract, and he cannot afterwards in chancery obtain the title. He has an election, and may proceed at law; and when he does, he is entitled to an indemnity, and no more. By a performance he would have recovered the land, and such recovery, that is, if he obtain the value at the time, that is the exact measure of his loss. As the plaintiff had performed on his part, he was entitled to the land, or to its value; and the instructions were correct."\*

In Iowa, in an action on a title bond, or bond conditioned to create a good title to lands, the measure of damages is the consideration money and interest.† But where a covenant is given that a third person shall make a title, the measure of damages is not the price or value of the land, but the value of the title at the time it was to have been made.‡

It has been said in Vermont, "that when the entire consideration for the conveyance has actually been received by the party who was to give the deed, the value of the land at the time it should have been conveyed, with interest, is obviously the proper rule; and so where a tender of personal chattels has been duly made, according to previous contract, in payment for the land; because by our law such a tender passes the property in the chattels over, against the will of the party to whom they are tendered, so that in fact and in law, he has the consideration stipulated for:" But the rule was held different where the land was to be paid for in work and labor, and the plaintiff's services had been performed only in part, and as to the remainder, been tendered but refused. Here it was held "that the recovery should be restricted to the extent of the plaintiff's actual damage; that the value of the land was important in estimating the damage, as far as the land had been paid for, and the stipulated services performed; but for the residue, it was an open question as to what the party had lost by being prevented from completing the execution of his contract."§

But how will it be when the land has fallen in value? In North Carolina, the plaintiff purchased a lot of land for \$8,000,

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\* *Hill vs. Hobart*, 16 Maine, 164.

† *Stewart vs. Noble*, 1 Iowa, 26.

‡ *Pinkston vs. Huie*, 9 Ala., 252. *Dyer vs. Dorsey*, 1 Gill. & J., 440. *Gibbs vs. Jemison*, 12 Ala., 820.

§ *Boardman vs. Keeler*, 21 Verm't, 77.



and paid the greater part of the purchase money. The plaintiff was let into possession and the defendant executed a bond in the penalty of \$10,000, conditioned to convey upon the payment of the balance of the purchase money. The plaintiff was evicted by the judgment creditors of the defendant, and the property sold by the plaintiff for \$2,500, which was admitted to be the real value of the property at the time. Here the court refused to allow the plaintiff to recover the amount of the purchase money as if he had repudiated the contract and sued for money had and received. "Here the plaintiff seeks to recover compensation; what sum will put him in as good a condition as if the contract had been performed? In this case he would have got property which is worth \$2,500, but he would have been forced to pay the balance of the purchase money and interest. He has not paid this latter amount, and his damage is the difference between that sum and the value of the property, which by the case agreed is \$207,80;" and to that sum the redress was limited.\*

We come now to actions against the purchaser. In England, when the vendee refuses to perform, the measure of damages is held to be the difference between the price fixed in the contract, and the value at the time fixed on for delivering the deed. It follows that if the property does not fall in value, the vendor can recover nothing. So, where the plaintiff and defendants had agreed that the plaintiff should sell and the defendants should buy a piece of land, the defendants refused to pay the price. The plaintiff insisted that the amount of the purchase money agreed on, with interest, was the proper measure of damages. But the judge who tried the cause, Rolfe, B., held that the plaintiff was only entitled to such damages as had resulted from the defendant's breach of the contract; and on argument of a rule to show cause why the damage should not be increased to the amount of the purchase money, it was said: "the question is how much worse is the plaintiff by the diminution in the value of the land or the loss of the purchase money, in consequence of the non-performance of the contract. It is clear that he cannot have the land and its value too."†

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\* *Nichols vs. Freeman*, 11 Iredell, 99.

† *Laird vs. Pim*, 7 Mees. & Wels., 474, per Parke, B. But see *Hawkins vs. Kemp*, 8 East, 410, and *Chitty Pl.*, vol. 2, 290.

This question, although raised, does not appear to have been absolutely decided in this country. In New York, in an action on an agreement of this nature, the plaintiff, the vendor, was allowed to recover the agreed price of the land, with interest. But although the case went up on other points, the question was not argued.\*

In Maine, where suit was brought for the price of a pew, a deed having been tendered and refused, it was said, though the point does not appear to have been discussed by counsel, that "the measure of damages was, as the judge instructed the jury, the price agreed to be paid for the pew by the defendant, who will be entitled to the deed whenever he chooses to accept it."†

This decision has been cited with approbation in New York in a case in which the following language was held.

"Suppose in the case of a covenant to convey a farm for a specified sum, and a deed tendered but refused, and the vendor sells to another, shall he yet recover the whole price of the original vendee? I admit that *in some cases*, where property is so tendered, and the tender is not withdrawn, the price may be recovered; but this is on the ground that the thing sold has an independent existence, and the *corpus* not being perishable, and having legally passed by the tender and subsequent recovery, may still be actually delivered over whenever the vendee shall demand it."‡

On the other hand, it has been said in Vermont, although the precise point was not before the court; "Where a party agrees to make a purchase of property, and then refuses to proceed in the bargain and take the property, the loss of the bargain constitutes the proper rule of damages, because the property never passed."§

The question is evidently not free from perplexity; on the one hand it is said that the vendor by making a tender, has performed his contract so far as it lies in his power, that his

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\* *Franchot vs. Leach*, 5 Cowen, 506.

† *Alna vs. Plummer*, 4 Greenleaf, 258.

‡ *Shannon vs. Comstock*, 21 Wend., 457. But in this very case, it was held, that where a plaintiff had agreed to take certain freight for a stipulated sum, and averred a readiness and offer to perform on his part, that he could not recover the contract price, but only as much as he had actually lost by the defendant's neglect; the court saying, "a tender and offer to perform is equivalent to performance for the purpose of *sustaining an action*. It is *quasi* performance, and *does not regulate the amount of damages*." See, also, *Hecksher vs. McCrea*, 24 Wend., 304; and *Costigan vs. Mohawk & Hudson R. R.*, 2 Denio, 610.

§ *Sawyer vs. McIntyre*, 18 Verm., 27.

right is complete to the performance of the contract by the vendee, and that this performance is the payment of the purchase money. But on the other side, it is replied with great force, that the recovery cannot pass the fee of the land, that the legal seisin still remains as at first, that the vendor has not parted with his property, that if the land has not fallen in price, he has lost nothing, that the common law gives damages for none but actual loss; and it is insisted that the true measure of damages in such case, is the difference between the stipulated price and the actual value at the time of breach, or perhaps at the time of trial. I shall have occasion again to consider this question, when we come to the subject of the sale of chattels.\*

In contracts of purchase of this description, a clause is often inserted for a deposit, and a forfeiture of that deposit if the purchaser do not fully carry out his agreement. In a case of this kind, where it was declared that the deposit was to be forfeited as liquidated damages, it was still held that the plaintiff could go for damages at large, and was not confined to the deposit.†

As to the interest, it has been held that where the vendee in a contract for the purchase of real estate, takes possession of the property as owner, without having paid the purchase money, he is bound to pay interest. The act of taking possession is an implied agreement to pay interest.‡

We have here to take notice of a class of cases of not unfrequent occurrence in the country, growing out of contracts to pay for work or services in land.

Where a contract is made to pay for work by the transfer of certain property, and the agreement is not performed, the value of that property, as a general rule, is the measure of

\* In the case of *Williams vs. Field*, vendor vs. vendee, MSS., in the Superior Court of New York, July, 1846, this precise question was raised and much examined, and the Court arrived at a conclusion adverse to the English rule. I should have entertained little doubt that the English rule were correct had it not been for this adjudication; in addition to which, however, being engaged for the defendant, my mind may have received an undue bias to the technical and strict application of the general principle. And see, in England, *Goodisson vs. Nunn*, 4 T. R., 761, and *Glazebrook vs. Woodrow*, 8 T. R., 866, where it certainly seems to be assumed, that if a proper tender be made of the deed the consideration money will be recoverable.

† *Icely vs. Green*, 6 Nev. & Man., 467, and *Vide post*, Chap. XVI.

‡ *Flodyer vs. Cocker*, 12 Vesey, 27. *Stevenson vs. Maxwell*, 2 Comstock, 409.

damages, because that is the stipulated reward for the services of the party, whatever may be their intrinsic value. This question has presented itself in New York and in Pennsylvania on parol contracts to pay for service in land. Such contracts are in the former state void, under the statute of frauds; and consequently if the party rendering the service sue, he must count generally for work and labor, without reference to the special agreement. If the contract be to convey land in consideration of a *specified sum* payable in work, the party can recover the value of his services, not exceeding, however, the sum fixed by the agreement; and the value of the land is not the measure of damages. But if in a contract of this kind no amount is specified, and the payment is to be in a designated piece of land, the plaintiff fixes the value of his services by proving the value of the land. Such, also, is the rule in Pennsylvania, where parol contracts for the sale of land are valid; subject however to the modification, that if before the work be done the other party give notice, *bona fide*, of his inability to perform, as when he cannot make a title, and his determination to rescind the contract, and the vendee still goes on to do the work, the measure of damages is not the value of the land, but the amount of injury sustained under all the circumstances.\*

The effect of a covenant to make partition and execute releases, was much considered in a case in New York,† which was an action of assumpsit for money paid to induce a party to enter into an agreement.

The plaintiff and defendant were joint proprietors in the proportion of one-third and two-thirds of certain lands, of which the plaintiff had conveyed a part by deed, with covenants for quiet enjoyment and of warranty; they then agreed, under seal, to partition the tract, so that the part conveyed by the plaintiff should be set off as his portion, appointed three persons to divide the lands, and covenanted to execute mutual releases. Partition being made, the defendant refused to execute the release agreed on: the plaintiff had paid the defendant four hundred dollars to induce him to enter into the agreement. The

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\* *Burlingame vs. Burlingame*, 7 Cowen, 92. *King vs. Brown*, 2 Hill, 485. *Rohr vs. Kindt*, 5 Watts & Serg., 563. *Jack vs. McKee*, 9 Barr., 235. *Bash vs. Bash*, ib., 261.

† *Shepherd vs. Ryers*, 15 J. R., 497.

judge charged at the trial, that the plaintiff was entitled to recover as damages all that he had been obliged to pay, or was liable to pay to the purchasers of the land from him, and the expenses of the partition, in other words, two-thirds of the amount of the consideration money, with interest, and one-third of the expenses of partition, together with four hundred dollars and interest. A verdict was taken for this sum, but the court set it aside, holding, that so long as the original covenant subsisted, the money paid by plaintiff, (*i. e.* the four hundred dollars,) could not be recovered back; that no eviction being shown, the plaintiff could only recover at most nominal damages; and it was suggested that the partition without any conveyance might have the effect of estopping the defendant to set up any title to his two-thirds. The court said, "The plaintiff might possibly apply to the Court of Chancery, and compel a specific performance of the defendant's agreement to release his claim to these farms, but as long as he chooses to rest upon his covenant for damages at law, he must show himself damaged, or he can only recover nominal damages."

Having thus disposed of the covenants in deeds, and in contracts to convey land, we shall next examine those contained in leases. So far as they are similar to the covenants in deeds, we have already considered them;\* but leases frequently contain additional agreements, the rule of damages in regard to which we shall now proceed to discuss.

In regard to the principal stipulation on the part of the lessee to pay rent, a question sometimes presents itself in regard to its apportionment; and it appears that where the plaintiff fails to prove title to the whole estate, as for instance when there are several assignees of the original lessor, the apportionment must

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\* *Supra*, 168, et seq. In the case of *Lewis vs. Campbell*, 8 Taunton, 715, the effect of a covenant for quiet enjoyment in a lease was considered, but not decided. The plaintiff set out an eviction, and in relation to his damages averred that he had "lost divers large sums of money, laid out in and about the *altering, improving, and ornamenting of the premises.*" Under this allegation, he sought to recover for additions of coach-houses and out-buildings, and also for converting the lands into pleasure-grounds. The question whether the measure of damages should be the value at the time of assignment or of eviction, was discussed, but not decided, the court being of opinion that the declaration was insufficient. See *Campbell vs. Lewis*, S. C. in Error, 3 Barnwell & Ald., 892.

be according to the value of the several parts held by each, and not according to the quantity or number of acres.\*

Of other covenants found in leases, the most frequent are covenants to repair, to rebuild, and to insure. In a suit on a covenant to repair, Lord Holt said, speaking in the loose manner in which the subject of compensation is treated in the early decisions, "In these actions there ought to be *very good damages*, and it has been always practiced so before me, and every body else that I ever knew."† This is a strong illustration of the extreme laxity which pervades all the early cases on the subject of damages. In England it has been held by Lord Ellenborough at *nisi prius*, that where a lease contains a covenant to repair the premises, and also to insure them for a specific amount against fire, the sum fixed in the latter covenant does not regulate the damages under the former.‡

In New York,§ it is held, that where it is covenanted between the lessor and the lessee, that at the expiration of the term, the buildings and improvements on the demised premises, are to be valued by persons to be chosen by the parties, which valuation the lessor is to pay the lessee, if, on the expiration of the term, the lessor refuses to agree on the appraisers, and the lessee appoints them, and has the buildings appraised, the valuation thus made, being *ex parte*, is not conclusive as to the amount of damages, but that they are to be ascertained by the jury.

Upon the covenant by the lessee to repair, it has been doubted whether an action could be brought before the expiration of the term, as the tenant might put the premises in repair at any time before his occupation terminated, and in such a case in New York, it was insisted on this ground that the plaintiff, the landlord, could recover only nominal damages.¶ But

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\* *Hodgkins vs. Robson*, 1 Vent., 276. *Farley vs. Craig*, 6 Halst., 262. *Gillespie vs. Thomas*, 15 Wend., 444. *Nellis vs. Lathrop*, 22 Wend., 121. *Stevenson vs. Lombard*, 2 East, 575. *Cole vs. Patterson*, 25 Wend., 456. *Van Renselaer vs. Bradley*, 3 Denio, 185. *Van Renselaer vs. Gallup*, 5 Denio, 454. *Van Renselaer vs. Jones*, 2 Barb. S. C., 648.

† *Vivian vs. Champion*, 2 Lord Raym., 1125.

‡ *Digby vs. Atkinson*, 4 Campb., 275.

§ *Holiday vs. Marshall*, 7 J. R., 211.

¶ *Scheiffelin vs. Carpenter*, 15 Wend., 400.

it seems well settled, both in England and this country, that on the covenant to repair, the suit may be brought before the end of the term, and that of course actual damages are recoverable.\*

In the same state,† where in the lease of a ferry the lessee covenanted to maintain and keep it in good order, and instead of so doing, diverted travellers from the usual landing to another landing owned by himself, by means whereof the tavern stand belonging to the plaintiff, the lessor, situated on the first landing, was so injured in its business as to become tenantless; it was held in an action by the landlord for breach of covenant, that he might assign and was entitled to recover as damages the loss of rent of the tavern stand. But in a subsequent decision,‡ it was intimated that the breach of covenant in this case was regarded as fraudulent.

In an English case,§ one Theobald had demised to the plaintiff certain brick earth for twenty-one years, with full power to the lessee to dig annually one half acre, and if he dug more, to pay £375 to the lessor for every half acre so dug, being after the rate that the whole brick earth *was thereby sold or intended to be sold*. The suit was trespass by the lessee for digging, and the jury found for the plaintiff with £550 damages, being the full value of the whole of the brick earth dug by the defendant. Chambre, J., considered that the plaintiff's beneficial interest was no more than the difference between the value of the earth taken by the defendant, and the price that the plaintiff must have paid for it if he had taken it himself, and that all the remaining interest was in reversion. But the court held otherwise. Mansfield, C. J., said, "The consequence of this taking by a stranger, and of this action against a stranger, is as between the lessee and the lessor, it must be taken to have been dug by the lessee; if this and what himself had dug did not together exceed the half acre per annum, there is nothing to pay; but if it exceeds that quantity, the lessee must pay the stipulated rent for the sur-

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\* *Luxmore vs. Robson*, 1 B. & Ald., 584.

† *Dewint vs. Wiltse*, 9 Wend., 825.

‡ *Blanchard vs. Ely*, 21 Wend., 842.

§ *Attersoll vs. Stevens*, 1 Taunt., 188, 201.



plus;" and a rule to set aside the verdict was discharged. Here the lease was treated as a sale of the earth.

In an action on a covenant\* to rebuild, contained in a lease, the defendants were assignees, and the plaintiff's wife tenant for life. The plaintiff contended that as tenant for life, she was entitled to recover general damages; in other words, the whole amount of damages sustained by the breach, and was not to be restricted to a compensation, measured by the extent of her particular estate. But Gibbs, C. J., at *nisi prius*, held otherwise; and that the tenant, in tail or in fee, might have an action on the covenant, and recover for the injury done to his reversionary interest.†

In an action on an agreement to keep the premises of every description in good and sufficient repair at the tenant's expense, it was held that the defendant might show, and the jury might consider, the state of repairs at the commencement of the demise, in order to compute the damages for which the defendant was liable.‡

In an action,§ brought by lessee against lessor, on a lease containing a covenant "to repair, and keep in good and tenantable repair, all the external parts of the demised premises," it was proved that the corporation of Exeter, where the property was, had taken down the adjoining building; that this had weakened the wall of the plaintiff's house, and that he was obliged to remove. After repeated fruitless requests to the defendant to repair, the plaintiff gave him notice that he should go on to rebuild at his (the defendant's) expense. While the work was going on, the plaintiff removed to other premises, where he made some alteration to enable him to carry on his business, and restored things to their original state when his own building was completed, and claimed for all this in damages; but the Court of Queen's Bench said: "We are of opinion that the defendant was not bound to find the plaintiff another residence whilst the repairs went on, any more than he would have been bound to do so had the premises been consumed by fire;" and, therefore, the items for rent and taxes

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\* Evelyn and Wife *vs.* Raddish and others, 1 Holt, 548.

† This case was reconsidered in 7 Taunt., 410, but on another point.

‡ Bardett *vs.* Withers, 2 Nev. & Per., 128.

§ Green *vs.* Eales, 2 Q. B. R., 225.



of the house temporarily taken by the plaintiff, and those for alterations and restorations of it, were deducted, intimating, however, that if any evidence had been offered as to the length of time during which the plaintiff was obliged to be in another house, by reason of the defendant's delay in not acting on the notice given him by the plaintiff to repair, it might have been considered. And the actual cost of repairing and replacing the fixtures of the demised premises, of the surveyor's charge for superintendence, and for injury to the plate glass and plastering, were allowed, the two last on the ground that if the defendant had taken proper steps to support the wall whilst the carpenters were taking down the adjacent building, the injury would have been avoided.

In an action brought on a covenant to keep one-half of a mill-dam in repair, it was held in Massachusetts that the plaintiff was entitled to recover only one-half of the actual expense incurred in repairing the dam; and that he was not entitled to damages for any loss of profits in business, in consequence of the neglect of the defendant reasonably to aid in making the repairs.\* In a case of trespass we have seen that such damages have been allowed;† and this distinction indicates the disposition, of which we find other proofs, to treat the wrong-doer, even where exemplary damages are not claimed, with more severity than the party who fails to perform a contract.‡

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\* *Thompson vs. Shattuck*, 2 Met., 615.

† *White vs. Moseley*, 8 Pick., 356. *Supra*, 80.

‡ In Tennessee, in covenant for breach of warranty of title to real estate, a verdict and judgment against the vendee of a tract of land in an action of ejectment, instituted by him against a third person in possession, with notice to the vendor to appear and prosecute, is no evidence of a better outstanding title; the court saying, "Where the vendee has been sued, he may notify the vendor to appear and defend the suit, and provision is made by law for making him defendant; but there is no principle by which he can be substituted as a plaintiff in the action of ejectment; and we, therefore, can think of no reason for notifying him in such a case to appear. *Ferrell vs. Alder*, 8 Humphreys, 44.

## CHAPTER VII.

### THE MEASURE OF DAMAGES IN ACTIONS ON CONTRACTS.

General rules of compensation in personal actions founded on breach of contract, without penalty or liquidated damages—Damages limited to the results of the breach of contract—Motives of the defendant not inquired into—Exceptions. The contract controls the measure of damages—Exceptions. Tender, how far equivalent to performance in reference to damages—Compensation in cases of partial or imperfect performance of contract—Rule of damages on continuing agreements—Forms of action employed—Account obsolete.

HAVING thus considered the rules which govern compensation in cases relating to real estate growing out of actions regarding its possession, its occupation, enjoyment, and contracts for its transfer, we now proceed to consider the great class of cases relating to personal property, including, of course, personal services.

These actions generally grow out of negotiable paper, policies of insurance, the sale and warranty of chattels, contracts of agency, suretyship, or other express executory agreements sealed or unsealed, as well as those implied contracts which the law engrafts upon a legal liability. These subjects will be considered separately, but before doing so it will be well to bear in mind the general principles upon which the English and American law proceed in cases *ex contractu*.

“Damages\* are recoverable in every personal action which lies at the common law.”† The language of the civil law is, *Loco facti impraestabilis succedit damnum et interesse*. We have already considered the subject of nominal dam-

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\* Sayer on Damages, ch. 1, 6.

† Supra, 46, et seq. So in Tennessee, where there has been a breach of contract without actual loss, the plaintiff is at all events entitled to a judgment for nominal damages and costs. *Seat vs. Moreland*, 7 Humphreys, 575.

ages, and seen how far the Courts go for the mere purpose of declaring a right. We are now to examine those cases of contract where substantial relief is demanded; and the two cardinal principles which will be found to pervade and regulate this branch of our subject, are—*First*, that the plaintiff must show himself to have sustained damage, or, in other words, that actual compensation will only be given for actual loss; and—*Secondly*, that the contract itself furnishes the measure of damages. These two rules are closely interwoven with each other, and it is impossible to consider them altogether separately. The first rule is one of great importance. It excludes a large class of cases in which relief is often sought before an injury has occurred; and we shall have frequent occasion to refer to it. So a surety cannot sue his principal till he has paid the debt; nor a covenantee, for quiet possession, his grantor, till he has been evicted; nor a covenantee against incumbrances, till he has paid the incumbrance; nor a principal his agent, till he has paid the loss sustained by the latter's misconduct.\* This rule is, however, not without exception, as we shall hereafter see. The second rule, that the contract itself furnishes the measure of damages, is of equal importance. We have already adverted to it generally, but we have now to consider it more fully, and at the same time to notice such exceptions to it as may be found to exist.

We have already had occasion to observe the vague discretion that in the early books is attributed to the jury in the matter of damages.† Thus in a case already referred to, as late as the reign of James I., where the plaintiff sued the defendant on a covenant that if certain land conveyed to him by the defendant, fell short of a specified measurement, he, the defendant, would pay a fixed sum for every deficient acre, and alleged that the number of acres wanting, would have amounted to the sum of £700, and the jury gave but £400 damages; it was held, that this was well found, and it was said, “if *all* the land was wanting, *still the jury are chancellors*, and can give such damages as the case requires in equity.”‡

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\* *Legare vs. Fraser*, 3 Strobhart, 377.

† *Supra*, 21.

‡ Sir Baptist Hixt's case, 2 Roll. Abr., 703. Trial, pl. 9. In Kentucky, in an ac-

So, even as late as the middle of the last century, in an action for escape against the sheriff, Lord Ch. J. Wilmot said, "In actions on the case, the damages are totally uncertain and at large."\* So, a standard text-writer† uses this language: "In all actions which sound in damages, the jury seem to have a discretionary power of giving what damages they think proper; for though in contracts the very sum specified and agreed on is *usually* given, yet if there are any circumstances of hardship, fraud, or deceit, though not sufficient to invalidate the contract, the jury may consider them, and proportion and mitigate the damages accordingly; as in a case upon a policy of insurance, which was a cheat, for an old vessel was painted, and goods of no value put in the vessel, and about £1500 insured on it, and then the ship was voluntarily sunk." There can be no stronger proof of the revolution that has been effected in this branch of our law, than is furnished by this citation. Here, even on promissory notes, the jury are said to have power to give a sum less than that expressed in them; and a contract which now the law would pronounce utterly void, is declared to be a matter for the mere discretion of the jury.

It is, in truth, but slowly and at comparatively a recent period that the jury has relinquished its control over actions even of contract, and that any approach has been made to a fixed and legal measure of damages. But, by degrees, the salutary principle has been recognized, and it is now well settled, that in all actions of contract, subject to the exception already noticed, and in all cases of tort where no evil motive is charged, the amount of compensation is to be regulated by

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tion of covenant on an agreement to pay for property, judgment was obtained. Suit was brought on that judgment, and the jury were told that *they were bound to give interest on the judgment*. The original agreement contained no stipulation for interest. The Court of Appeals said: "It is true, according to the ancient course of the common law, although the value of the things covenanted to be performed usually regulated the amount of damages, the jury in an action altogether in damages did in some instances exceed that measure; but they did not so because the law subjected the covenantor to the payment of interest, but in the exercise of a sound discretion with which they were invested, regulated by what, under the peculiar circumstances of the case, they might think just." And for the reason that the charge controlled the discretion of the jury, the judgment was reversed. *Guthrie vs. Wickliff*, 4 Bibb, 541. *S. P. Cogswell's Heirs vs. Lyons*, 8 J. J. Marsh, 88.

\* *Ravenscroft vs. Eyles*, 2 Wils., 295.

† *Bacon Ab., Tit. Damages, D.*

the direction of the court, and the jury cannot substitute their vague and arbitrary discretion for the rules which the law lays down.

It is, in fact, indispensable that it should be so: the measure of damages is the gist of the remedy; the remedy is no part of the facts of the cause, while, on the other hand, it so completely controls the rights of the parties, that if any absolute discretion be given to the jury over the amount of compensation, the power of the court over questions of law, would be most emphatically a barren sceptre. The measure of damages in all cases, then, where no complaint is made of evil motive, is a pure question of law; in all cases of contract, the sole object of the court is to ascertain the agreement of the parties, and that agreement, as a general rule, controls the measure of remuneration. "In contracts," said the Supreme Court of Massachusetts,\* "where the precise sum is fixed and agreed on by the parties, as in many actions of assumpsit and of covenant, the jury are confined to that sum." "In no case," says the Constitutional Court of South Carolina, "where the action is for money had and received, goods sold and delivered, or for work and labor performed, which from the nature of the contract itself furnishes the standard of assessment, are the jury allowed to give more than the amount received, with interest, or the value of the articles delivered or the services rendered."† So in Ohio, where land had been sold at a given price, and the securities turning out valueless the original owner of the land brought suit, and it was contended for the defendant that he had a right to show the value of the land; but the Supreme Court said, "The law permits parties in their agreements to fix their own terms, conditions, and prices, and the court did not err in holding the amount estimated by themselves, with the interest thereon, to be the rule of damages."‡ "There are certain established rules," says the Court of Exchequer in England, "according to which the jury ought to find. And here there is a clear rule, that the amount which would have been received if the contract had been kept, is the measure of damages if the contract is broken."§

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\* *Leland vs. Stone*, 10 Mass., 459.

† *Ferrand vs. Bouchell*, Harper's R., 88, and *infra*, 205.

‡ *Taft vs. Wildman*, 15 Ohio, 128.

§ *Alder vs. Keighley*, 15 Mees. & W., 117.

"It is desirable," says the Supreme Court of Massachusetts, "to have as definite and precise rules on the subject of damages as practicable."\* "A proper administration of justice requires that the rules established by law for the assessment of damages, should be adhered to," says the Supreme Court of Louisiana.† It has been repeatedly said, that courts will not attempt to modify the contracts of the parties. Their only duty is to expound and to enforce them.

In connection with this subject, it may be noticed that where the contract is one by which the plaintiff is to receive not money, but the transfer of certain property or services, then the value of the original consideration is not to be inquired into, but the value of the property or services is the measure of damages. So as we have seen,‡ where land is the mode of payment, the value of the land is the compensation. So where the plaintiff had forborne a debt, on consideration that the defendant would build a house and give a lease of it, the value of the lease is the standard.§ "If," said Parke, B., "the consideration is to be paid in money, it must be paid; if by the delivery of a thing of ascertained value, that value is the measure of damages." So, where a wagon was transferred in consideration that the defendant would break up certain land, the value of the labor, and not of the wagon was held to be the measure of damages.¶

So again, if the rent of mills is to be paid in repairs, the measure of damages is the value of the repairs agreed to be made, and the plaintiff cannot recover on a *quantum meruit*. When there is an express agreement proved, the plaintiff cannot resort to an implied one.¶

We have now to consider the exceptions which have been engrafted upon this general rule that the contract, as a matter of law, fixes the damages. And the first that presents itself is that growing out of the question whether the motives of the defaulting party are in any case to be taken into consideration.

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\* Batchelder vs. Sturgis, 3 Cush., 201.

† Arrowsmith vs. Gordon, 3 La. Ann. R., 105.

‡ Supra, 198.

§ Strutt vs. Farlan, 16 Mees. & W., 249.

¶ Ellison vs. Dove, 8 Blackf., 571.

¶ Baldwin vs. Leasner, 8 Cobb's Georgia, 71.

It has been already said\* that our law makes a broad distinction on the subject of compensation between actions of contract and actions of tort, and while it permits the jury in the latter instance to take into consideration the intention of the offending party, to review all the circumstances of the case, and to make their verdict conduce to the purposes of punishment as well as compensation, that on the other hand in actions of contract the motive or *animus* of the defendant is entirely disregarded, and the damages are strictly limited to the direct pecuniary loss resulting from the breach of the agreement in question.

This rule has been hitherto stated without argument, as the clear and irresistible inference from the structure of our forms of action, and the rules of evidence applied to them; but as suggestions to the contrary have been in a few instances made, and as some exceptions undoubtedly exist, it is proper here more particularly to assign the reasons upon which I suppose the general rule to rest.

"There are instances," says Mr. Chitty in his very valuable work on Contracts,† "in which the defendant may be regarded in the light of a wrong doer in breaking his contract, and in such case a greater latitude is allowed the jury in assessing the damages;" and he refers to a case,‡ of an action of debt on bond

\* Supra, 27, 28, 86, 68, 95, 194.

† Page 684.

‡ Lord Sondes *vs.* Fletcher, 5 B. & Ald., 835. There may be some other English cases which give color to the doctrine as laid down by Mr. Chitty; but I find none where the point has been disowned or decided, with the exception of those subsequently referred to in the text. It may well be that in cases where evidence of fraud has incidentally appeared, and so blended with the other testimony showing the breach of contract that it could not be excluded, it has been allowed to influence the damages, without the point being in any way discussed.

But in South Carolina the question has been discussed at large, and the ground distinctly taken, that even in cases of assumpsit, damages will be given on the ground of fraud. The high authority of the courts of that State, demand for their decisions a somewhat extended notice. An action of assumpsit was brought there, to recover damages upon the sale of cotton, alleged to be fraudulently and falsely packed by having the cotton in the centre of the bales wet. It was sent to Liverpool and sold as sound cotton, at the then current price. After the sale, the fraud was discovered, and the cotton returned, and resold as damaged, at a considerable loss. The defendants contended that if liable at all, the plaintiffs could only recover the price paid at Charleston, with interest. The presiding judge, however, instructed the jury that they might give a verdict for the whole amount of damage that the plaintiffs had sustained, which was the difference between the two sales in Liverpool, with interest. The jury having found a verdict according to the direction of the court, on motion for



given to resign a living where the defendant refused to perform the condition of his agreement, but without any circumstances of aggravation, and the court on a motion for a new

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a new trial, the court, by Mr. Justice Nott, said: "Assumpsit is *nomen generalissimum*, under which a great variety of special cases are embraced. The damages to be recovered must always depend on the nature of the action and the circumstances of the case. In an action for money had and received, the actual amount of money received, (with interest in some cases,) should be the measure of damages; in an action for goods, or any specified chattel sold and delivered, the value of the thing sold; and so on in all other cases which furnish a standard by which the jury can be governed. But in cases of fraud and other cases merely *sounding in damages*, the jury may give a verdict to the whole amount of the injury sustained, or *imaginary damages*."

After commenting on the case of an action for a breach of promise of marriage, and other English cases, the court proceeded:

"I apprehend, that after all these cases, it can no longer be considered, as has been somewhat confidently asserted in this case, that even *vindictive damages* may not be given in an action of assumpsit, and surely it will not be denied that the plaintiff may recover the amount of the loss *which he has actually sustained*."\* It will be noticed that two judges dissented.

And in a subsequent case of covenant on a bill of sale of a negro warranting his soundness, (the breach assigned being the unsoundness of the negro,) the judge charged that the only true measure of recovery was the amount of consideration mentioned in the deed, and interest. A motion was made for a new trial, and the court, referring to the previous case, said: "This, it will be recollected, is an action of covenant, an action *sounding altogether in damages*, and the measure of recovery is to the extent of the injury which the party sustains by the infraction of the covenant, whether it be partial or total, and must necessarily depend on the particular circumstances of the case, although the consideration paid might, in most cases, constitute the best evidence of the injury which a party sustained; yet in actions *sounding altogether in damages*, it seems to me to follow of necessity that the measure of recovery must depend on the particular circumstances of the case;" and a new trial was granted.†

Again, in another case, an action being brought by a mechanic for work and labor, &c., in the erection of a house for the defendant, the jury having allowed an arbitrary sum of double the amount of interest due, the verdict was set aside, the court saying, "There is no doubt that damages at the discretion of the jury may sometimes be given in an action of assumpsit, as where the action is founded in fraud or deceit, or when a party fails to perform a contract, by which the other party sustains a special damage, or where it is so badly performed as to frustrate the expectations of the party for whose benefit it was intended. \* \* But in no case where the action is for money had and received, goods sold and delivered, or for work and labor performed, which, from the nature of the contract itself, furnishes the standard of assessment, are the jury allowed to give more than the amount received, with interest on the value of the articles delivered or the services rendered."—*Ferrand vs. Bouchels*, *Harper's Reports*, 88, anno 1828.

The English authorities referred to in the first of these cases, are *Nurse vs. Barnes*, T. Raymond, 77, (*Supra*, 94;) *Stuart vs. Wilkins*, Douglas, 18; and *Williamson vs. Alison*, 2 Earl, 446; neither of which seem to me, with deference, to bear upon the question, nor am I able to understand what the court means by the phrase "*sounding in damages*." All actions at law, except on contracts for a sum certain, may be said to sound in damages. But what appears more fatal than the absence of express authority, is the general system of our jurisprudence, and the fact that if this rule of damages

\* *Rose & Rodgers vs. Beattie*, 2 Nott & McCord, 533, 1830.

† *Garrett vs. Stuart*, 1 McCord, 514, anno 1831.



trial said, that the defendant being a *wrong doer*, the jury were not bound to fix their verdict at the precise value of the living to him; and on the further ground that the plaintiff had offered to waive all damages if the defendant would resign the living, they refused a new trial.

This, which is the only English authority cited for the position, is very far from supporting the doctrine of Mr. Chitty's text; and it must in all cases require very clear and stringent authority to warrant so great a disturbance of the settled principles of pleading and evidence. It is to be borne in mind, that the rules of damages are all intended to conform to those other fundamental rules which determine the issue to be tried and the testimony on which it is to be decided. Pleading prescribes the form of action, and declares the precise issue. Evidence points out the testimony to be given in support and discharge of the demand, while the damages are awarded in conformity to those rules which govern the proceedings in the cause down to the time of trial.

As to the pleadings, it is the constant and sedulous object of the Anglo-American law, to draw a distinct line between actions of contract and those of tort, *ex contractu* and *ex delicto*; and the rigor with which this distinction is maintained in regard to rejoinder of counts, causes of action and election of actions, is familiar learning. No form of action has yet been devised for the fraudulent breach of an agreement.\*

But what becomes of this distinction, if in an action of contract damages are to be awarded on the ground of the fraud, malice, or other ill conduct of the defendant. Every action of contract may become one of tort, and the barrier between these classes of actions is at once and completely broken down.

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applies to one form of the action of assumpsit, it must equally apply to all, that if it be sound, no reason whatever can be assigned why vindictive damages should not be given for the malicious or fraudulent refusal to pay a promissory note; and to carry it to this extent would, I think, virtually revolutionize not only our rules both of pleading and of evidence, but introduce most serious innovations in the general rules which regulate the rights of parties. Whether such a revolution be or be not desirable, is, as I have already said, another and a very different question.

\* As far as the rules of pleading are concerned, the only color for this theory is derived from the rule that on a warranty of chattels either case or assumpsit will lie, and that if the former be brought and fraud laid, the *scienter* need not be charged, nor if charged need it be proved. *Stuart vs. Wilkins*, Doug., 17; *Williamson vs. Allison*, 2 East, 446. But this is very wide of the doctrine, that in actions of contract damages can be given for acts of a tortious nature.

Again, as to the rules of evidence, while it is perfectly true that in actions of tort every attendant circumstance of aggravation can be given in evidence; on the other hand, nothing is better settled than that in actions of contract the parties are limited to the mere evidence of the breach of contract. But if damages are to be awarded on account of the oppressive, malicious, or fraudulent conduct of the defendant, it is manifest that this rule cannot be maintained; if one party gives evidence of such a character, it is plain that the other must have the right to rebut the testimony, and in this way the form of the action, the issue *ex contractu*, and the rules of testimony would be completely lost sight of. If, at the trial, the evidence of a breach of contract were complete, certainly an offer to show that the defendant's act was dictated by a malicious, fraudulent, or oppressive spirit, would not be allowed; and it is very clearly inadmissible to consider as in evidence for the purpose of regulating the damages, testimony incidentally introduced, which could not be directly given. And what limit is to be assigned to the operation of this rule? If it holds good in regard to one contract, it should be true as to all. It will be noticed hereafter, that with the exception of the State of South Carolina, it has been applied only to contracts in regard to real property; but if sound as to an action of covenant with regard to real estate, it must be equally so as to an action of assumpsit on a promissory note. And if the motives of the defendant are to be inquired into, what sort of an examination is to be instituted? Is fraud alone to be repressed, or are malice and oppression to be equally sought out and punished, as in ordinary cases of tort?

In one of the earlier cases in which it was intimated, that in cases of fraud in the conveyance of land, the rule of damages would be carried beyond the measure in an ordinary case of breach of covenant, a different form of action was clearly pointed out. "If any imposition," said the Supreme Court of New York, "is practiced by the grantor, by the fraudulent suppression of truth or suggestion of falsehood in relation to his title, the grantee may have an action on the case in the nature of a writ of deceit, and *in such action* he would recover to the full extent of his loss."\* "It is agreed on all hands," said Savage,

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\* *Pitcher vs. Livingston*, 4 J. R., 1, 12.

C. J.,\* in a suit brought on the covenant against incumbrances, "that if fraud can be shown, or concealment which would be evidence of it, that would constitute a good ground of action, in which the purchaser would recover all his damages;" and the learned reporter in his marginal note assumes this to be an *action on the case*.

The action on the case for fraud in the sale of land, is recognized by the highest authorities in our law, and by repeated decisions, and its existence furnishes another reason why the remedy in the action on the contract should not be pushed beyond its legitimate limits.†

On the whole, therefore, notwithstanding the cases cited in the notes, and the authority of the tribunals by which they are decided, I conclude that so long as our present forms of action, rules of pleading and evidence, exist, their clear and irresistible result is, that the damage in actions of contract are to be limited to the consequence of the breach of contract alone, and that no regard is to be had to the motives which induce the violation of the agreement.‡

\* *Dimmick vs. Lockwood*, 10 Wend., 142, 155.

† Har. & But., Notes to Co. Lit., 884 a. Com. Dig., Action on the case for deceit, A. 8. *Culver vs. Avery*, 7 Wend., 380. *Sandford vs. Handy*, 23 Wend., 260. *Van Eps vs. Harrison*, 5 Hill, 68. I am far from desiring to express any opinion in favor of the doctrine of the text: on the contrary, if the plaintiff in an Anglo-Saxon court of justice shall ever be permitted to state his complaint according to the actual facts, and not be compelled to use an unmeaning formula, I can see no reason, greatly as legal relief would be thus extended, why exemplary damages should not be given for a fraudulent or malicious breach of contract, as well as for any other wilful wrong. Damages are given by the civil law in many cases of this kind. So they are in Louisiana, the jurisprudence of which State is very much fashioned on the great Roman original. But it does not appear to me that as yet the principle has been engrafted in any regular or practical way on the common law, unless in the exceptions subsequently stated in the text. In this work, my only object is to expound the rules of law as they appear to me to exist.

‡ In Louisiana, where the subject of damages is controlled by the Code, it has been said, "That in case of breach of contract, whether by the negligence or fraud of a party, no other sum can be allowed as damages than that which fully indemnifies the creditor."—*Ryder vs. Thayer*, 3 La. Ann. R., 149.

Louisiana is the only State, I believe, in the Union where an effort has been made to reduce the subject of damages to statutory limits. I annex here the provisions of their code on the subject. It will be seen that, in all cases except contracts for the payment of money, where the creditor can recover interest only, a distinction is recognized, between the breach of contracts arising from incapacity and that caused by bad faith or evil design.

Art. 1928. Where the object of the contract is any thing but the payment of

To this general rule, however, there undoubtedly exists an important exception, which has been introduced from the civil law, in regard to damages recoverable against a vendor of real estate who fails to perform and convey the title. In these cases the line has been repeatedly drawn between parties acting in good faith and failing to perform because they could not make a title, and parties whose conduct is tainted with fraud or bad faith. In the former case, the plaintiff can only recover whatever money has been paid by him, with interest and expenses. In the latter, he is entitled to damages resulting from the loss

money, the damages due to the creditor for its breach are the amount of the loss he has sustained, and the profit of which he has been deprived, under the following exceptions and modifications:—

1. When the debtor has been guilty of no fraud or bad faith, he is liable only for such damages as were contemplated, or may reasonably be supposed to have entered into the contemplation of the parties at the time of the contract. By bad faith in this and the next rule is not meant the mere breach of faith in not complying with the contract, but a designed breach of it from some motive of interest or ill-will:

2. When the inexecution of the contract has proceeded from fraud or bad faith, the debtor shall not only be liable to such damages as were or might have been foreseen at the time of making the contract; but, also, to such as are the immediate and direct consequence of the breach of that contract; but even when there is fraud, the damages cannot exceed this:

3. Although the general rule is that damages are the amount of the loss the creditor has sustained, or of the gain of which he has been deprived, yet there are cases in which damages may be assessed without calculating altogether on the pecuniary loss, or the privation of pecuniary gain to the party. Where the contract has for its object the gratification of some intellectual enjoyment, whether in religion, morality, or taste, or some convenience or other legal gratification, although these are not appreciated in money by the parties, yet damages are due for their breach; a contract for a religious or charitable foundation, a promise of marriage, or an engagement for a work of some of the fine arts, are objects and examples of this rule. In the assessment of damages under this rule, as well as in cases of offences, quasi offences, and quasi contracts, much discretion must be left to the judge or jury, while in other cases they have none, but are bound to give such damages under the above rules as will fully indemnify the creditor, whenever the contract has been broken by the fault, negligence, fraud, or bad faith of the debtor:

4. If the creditor be guilty of any bad faith which retards or prevents the execution of the contract, or if, at the time of making it, he knew of any facts that must prevent or delay its performance, and concealed them from the debtor, he is not entitled to damages:

5. Where the parties, by their contract, have determined the sum that shall be paid as damages for its breach, the creditor must recover that sum, but is not entitled to more. But when the contract is not executed in part, the damages agreed on by the parties may be reduced to the loss really suffered, and the gain of which the party has been deprived; unless there has been an express agreement that the sum fixed by the contract shall be paid, even on a partial breach of the agreement. And see *Arrow-smith vs. Gordon*, 3 La. Ann. R., 105. *Porter vs. Barrow*, Ib., 140.

of his bargain.\* This exception cannot, I think, be justified or explained on principle, but it is well settled in practice.

To the general rule another exception also exists, that of breach of promise of marriage. In this action, though in form *ex contractu*, yet it being impossible from the nature of the case to fix any rule or measure of damages, the jury are allowed to take into their consideration all the circumstances, and, provided their conduct is not marked by prejudice, passion, or corruption, they are permitted to exercise an absolute discretion over the amount of compensation. "The damages in this action," says the Supreme Court of New York,† "rest in the sound discretion of the jury, under the circumstances of each particular case."‡ And this exception is perhaps one of the strongest proofs of the general rule.

But when it is said that the contract furnishes the measure of damages it is not thereby meant that the party ready to perform his contract will be able to recover of the party in default the entire price named in the agreement. On the contrary, it has been held in many cases, that in actions for breach of contract the measure of damages is not the price stipulated to be paid on full performance, but the actual injury sustained in consequence of the defendant's default. For the rule that the contract furnishes the measure of damages, is subject to the other rule already stated, that compensation is only to be given for actual loss.

So on a contract to transport horses in a canal boat for a given sum of money, the plaintiffs averred a readiness and offer to perform on their part, and a neglect and refusal on the part of the defendants to furnish the freight, and claimed to recover the entire sum specified in the agreement. But the Supreme Court of New York held that they were only entitled to recover what they had actually lost by the defendants' non-performance, saying, "Suppose the plaintiffs had the next hour been furnished with freight entirely adequate to the voyage at the same

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\* *Flureau vs. Thornhill*, 2 W. Bl., 1078. *Hopkins vs. Grazebrook*, 6 B. & Cres., 81. *Robinson vs. Harman*, 1 Exch., 850. *Bitner vs. Brough*, 11 Penn. R., 127, and *supra*, 191.

† *Southard vs. Rexford*, 6 Cowen, 254.

‡ *Torre vs. Somers*, 2 N. & M., 267. *Coryell vs. Colbaugh*, Coxe, 77. *Stout vs. Parll*, Coxe, 79. *Greene vs. Spencer*, 8 Miss., 818. *Hill vs. Maupin*, 8 Miss., 828.

sum, they then would have been entitled to the damage arising from detention for that time, but no more. A tender and offer to perform is equivalent to performance, but merely for the purpose of sustaining an action; it is not performance, though in one respect it resembles it consequentially. It is *quasi performance*, but it does not regulate the amount of damages.”\*

So, also, in Kentucky, it has been held, that a plaintiff contracting to do work for a stipulated price, and who is ready to perform his agreement, but is prevented by the other party, cannot recover the price named in the contract for the whole work, but only the actual damages sustained by him. And as “the amount of compensation which the plaintiffs had recovered exceeded the value of the work they had done, and as, moreover, they did not attempt to prove any special loss or damage, they were held not entitled to recover any thing.”†

So, also, in New York, where the defendant agreed with the plaintiff, a boarding-house keeper, for rooms and board for a year at a stipulated price, and quitted them within the time, it was held that if the plaintiff was entitled to recover at all, the measure of damages would not be the price stipulated to be paid, but only such damages as had resulted from the defendant’s breach of contract. And Bronson, J., said “If the plaintiff could recover, she was not entitled as a matter of course to the stipulated price for the use of the rooms to the end of the year, but only to such damages as had directly and necessarily resulted from the breach of the contract. She could not refuse the rooms to other lodgers, leaving them idle, and then recover against the defendant as for use and occupation. Although a party be chargeable with a breach of contract, the other party has no right to conduct in such a manner as to make the damages unnecessarily burdensome.” But the plaintiff was held not entitled to any thing, on the ground of the contract being within the statute of frauds.‡

So, again, in the same State, where the plaintiff was employed

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\* *Shannon vs. Comstock*, 21 Wend., 457. It is difficult to reconcile this reasoning with that which allows the vendor, in cases of contract for the sale of land, to recover the full price.

† *Chamberlain vs. McCallister*, 6 Danas’ Ky. Reports, 352. See, also, *Caldwell vs. Reed*, *Littell’s Select Cases*.

‡ *Wilson vs. Martin*, 1 Denio, 602. See, to same point, *Spencer vs. Halstead*, 1 Denio, 606.



by the defendant to do certain work; after he began to do it, the order was countermanded by the defendant, but the plaintiff went on to complete the job, and insisted that he was entitled to recover for doing the whole and for the materials furnished, and so the Common Pleas held. But on error, the judgment was reversed; the Court saying, "that in all such cases, the just claims of the party employed are satisfied when he is fully compensated for his part performance and indemnified for his loss in respect to the part left unfinished, and to persist in accumulating a larger demand is not consistent with good faith towards his employer."\*

So, again, where a party was employed as the superintendent of a railroad for a certain time at a specified compensation, and was dismissed without cause. He was held *prima facie* entitled to recover for the whole time; but that the defendants might show in diminution of damages that after the plaintiff had been dismissed he had engaged in other business.†

There is a class of decisions which may at first sight appear to be opposed to the general rule, that the contract furnishes the measure of damages. In an early case, brought on an assumpsit to pay for a horse a barley-corn a nail, doubling it every nail, with an averment that there were thirty-two nails in the shoes of the horse, which, being so doubled every nail, came to five hundred quarters of barley; the judge, who tried the cause, directed the jury to disregard the contract, and to give the value of the horse in damages, which was £8, and so they did.‡

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\* Clark *vs.* Marsiglia, 1 Denio, 817. And see Durkee *vs.* Mott, 8 Barb. S. C. R., 428.

† Costigan *vs.* Mohawk & H. R. R., 8 Denio, 610; and see, also, Hecksher *vs.* McCrea, 24 Wend., 804. And in Arkansas, Walworth *vs.* Pool, 4 English, 894.

‡ James *vs.* Morgan, 1 Levinz., 111. In another case, a somewhat similar contract came up on demurrer. The plaintiff declared, on an agreement, that the defendant, in consideration of 2s. 6d. in hand paid, and of £4 17s. 6d. to be paid on performance, agreed to deliver two grains of rye corn, on Monday, the 29th of March, and four grains on the next Monday, and so doubling, *quolibet alio die Lunæ* for one year. The defendant demurred, saying, "that the agreement appeared, upon the face of it, to be impossible, the rye to be delivered amounting to such a quantity as all the rye in the world was not so much, and being impossible was void; and the defendant not bound to perform it." But after argument the Court thought otherwise. Powell, J., saying, "That though the contract was a foolish one, it would hold in law, and the defendant ought to pay something for his folly;" whereupon the reporter adds, "the counsel for the defendant perceiving the opinion of the court to be against his client, offered the plaintiff his half crown and his costs, which was accepted of; and so no judgment was given in the case."

The principle of this decision is, that if the agreement be unconscionable, the court will render such damages as may appear reasonable, without being bound by the terms of the contract. So in Massachusetts, where a note had been given to stay execution payable in oats at 20 cents per bushel, when in fact they were worth 37 cents, it was held that the jury might disregard the contract on the ground that it was unconscionable, and fix the value of the oats at 20 cents.\*

So a standard text writer tells us that, "on an action brought on a promise of £1,000 if the plaintiff should find the defendant's owl, the court declared, though the promise was proved, that the jury might mitigate the damages.†

But in truth the assertion of the right to sever the contract, to declare a part of it unconscionable and oppressive, and to decree performance of the remainder, is the exercise of an equitable power of a high order, the incautious exercise of which might lead to very dangerous results. And the decisions just cited would, I think, be more properly brought within the rule which governs cases of fraud and oppression. If the contract is on its face so extortionate and unjust as to bear evident marks of deceit, then, instead of wasting time in trying to reduce the relief to the standard of strict justice, the whole agreement should be pronounced void.

The rule that the contract furnishes the measure of damages is also subject to further remark. As a general principle it is the actual loss alone for which the common law seeks to give compensation; but in regard to contracts for the sale of

A question arose on the meaning of the contract, the defendant insisting that *quolibet alio die Lunæ* meant *every* Monday, but Lord Holt said it must be construed "*every other Monday*." This made a material difference in the possibility of executing the contract, for if the quantity were doubled thirty times, it would have reached 125 quarters; if fifty-two, it would have amounted to 524,288,000 quarters. *Thornborrow vs. Whiteacre*, 2 Lord Raym., 1164.

And the principle of *James vs. Morgan* was approved of by Lord Chancellor Hardwicke, in *Earl of Chesterfield vs. Jansen*, 1 Wils., 286, 895.

\* *Cutler vs. How*, 8 Mass., 257; *Cutler vs. Johnson*, 8 Mass., 266, and *Baxter vs. Wales*, 12 Mass., 365. *Leland vs. Stone*, 10 Mass., 459.

And Lord Mansfield used analogous language in regard to the action for money had and received. "Shall a man," said his lordship, "in an action for money had and received, which is an equitable action, and founded on conscience, recover an unconscionable, exorbitant demand? Most clearly he shall not." *Jestons vs. Brooke*, Cowp., 798; and *Floyer vs. Edwards*, Cowp., 112.

† *Bacon Abr.*, Damages D.



land we have already seen,\* and in regard to contracts for the sale of chattels we shall hereafter see, that in this country, if the vendor tenders complete performance on his part, he is at liberty to recover, not merely what he loses by the non-performance of the vendee, but the entire contract price; while in England, on the other hand, the vendor of land is limited to compensation for such actual injury as may have resulted from the breach of the agreement. The American rule attributes to the common law courts the exercise of the equitable power of compelling specific performance, as to the vendor, while at the same time the tribunal is incapable of enforcing either a transfer or a conveyance.†

Another apparent exception to the general rule has been made in the action of *assumpsit* for rent. So in England, in a suit for use and occupation where an agreement of hiring had been made at £450, with a right of sporting, and of occupation of the glebe, it was shown that the plaintiff, the landlord, had no power to grant the privilege of sporting and that he also failed in procuring the glebe for the defendant's occupation. On this state of facts it was held by the English Common Pleas, "that an eviction of part of the premises being shown, the jury was to ascertain, *independently of any agreement*, what the defendant ought to pay."‡

But I should be inclined to doubt the accuracy of this language: the jury are, it is true, not to be absolutely bound by the agreement; but they cannot, I should suppose, act independently of it. The proper course would be to assume the agreed rent as the fair value of the entire premises, and on that basis to make a proper deduction for the portion which the tenant had not enjoyed; and this seems to be in analogy with the class of cases which we shall next consider.

Wherever a contract is indivisible, but one action can be

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\* *Supra*, 190.

† In this, as in many other cases, we shall perceive in this country a gradual inclination to attribute chancery powers to the courts of law, and to approach the system of equitable relief. It may be questioned whether this mode of altering our system is judicious. I entertain no doubt whatever that it is most desirable to mould and blend together the two jurisdictions of law and chancery, so as to enable one tribunal to have complete cognizance of the entire cause and all its incidents. But as long as the jurisdictions are kept distinct, I am not inclined to believe that the administration of justice will be benefitted by any confusion of their remedies.

‡ *Tomlinson vs. Day*, 2 Brod. & Bing., 680.

brought for damages resulting from its non-performance;\* but it often becomes a question, how far a contract is to be treated as entire. And a modification of the general rule which makes the agreement control the amount of damages, is also to be found in that class of cases where the contract is on its face an entire one, and having been performed only in part, compensation is sought for what has been actually done. Such are cases of agreements to work for a specified time for a given sum, where the party employed quits his employment without the consent of the other, and before the period fixed; agreements to deliver a certain quantity of goods, and delivery of only a part; agreements to do work, as building for instance, according to certain specifications, where the work is done but the specifications are departed from; whether in these cases the party failing to perform his agreement has any redress whatever, and to what extent, is a very delicate and much vexed question, which perhaps more properly belongs to the subject of the right of action than that of the measure of damages.† In

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\* *Campbell vs. Gates*, 10 Penn. State R., 488.

† It may not be improper, by way of elucidating the text, to take notice of some of the leading cases. The general principle established by the earlier decisions, is, that where the contract is entire, as where A. agrees to do a certain thing for which B. is to make a certain compensation, the doing of the thing by A. is a condition precedent, and he has no remedy until he has fully performed his part.

It has been held in some cases that where the party employing another puts an end to the contract without just cause, the party employed has a right to exact the entire amount of his wages. This, however, is subject to the right to recoup what the plaintiff could reasonably have earned during the time covered by the remainder of the contract. But we are now speaking of the relief claimed where the party employed has not performed his agreement.

So in England, where a master had given a mate a note, promising to pay him thirty guineas, "*provided he proceeded, continued, and did his duty, as mate, &c.*" on a certain voyage to Liverpool, and the mate died during the voyage, it was held in a suit brought by his administratrix, that nothing could be recovered, either on the contract or on a *quantum meruit*. *Cutter, Adm'x, vs. Powell*, 6 T. R. 820. So if a builder undertakes a work of specific dimensions and materials, and deviates from the specifications, he cannot recover, neither upon the contract nor upon a *quantum valebant*, for the work, labor and materials, *Ellis vs. Hamlen*, 3 Taunt. 52. So, where A. undertook for a specific sum of money to *repair and make perfect* a given article then in a damaged state, and did repair it in part, but did not make it perfect, it was held that he could not, in an action of assumpsit, recover for the value of the work done and the materials found. *Sinclair vs. Bowles*, 9 B. & Cres. 92. So, where a servant hired for a year, refused to obey his orders and was dismissed, and brought suit for the time he had actually been employed, it was held by Lord Ellenborough at *nisi prius*, he could not recover. *Spain vs. Arnott*, 2 Stark. 256. So on an agreement to deliver 100 bags of hops by a certain day, and part delivery being made and refused, suit was brought; the plaintiff was nonsuited; the court, however, using language somewhat ambiguous,

these cases where the plaintiff is entitled to recover, the agreement of the parties still to a certain extent furnishes the mea-

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saying, that "the contract was entire and could not be split, and that the plaintiff had no right to sue until the whole quantity was delivered, or until the time for delivering the whole had arrived." *Waddington vs. Oliver*, 5 Bos. & Pull. 61; and the same decision was made upon a contract for the sale of 100 sacks of flour. *Walker vs. Dixon*, 2 Stark. 251.

So where the defendant had agreed with plaintiff to supply him with 150 tons of cast iron girders, as per drawings to be provided by the plaintiff, and drawings for a few tons weight only were sent within the necessary time, it was held by the Court of Common Pleas, that the contract was not divisible, and that as drawings for the whole of the girders had not been sent, the plaintiff could not recover for the non delivery of those for which drawings had been sent. *Kingdom vs. Cox*, 5 M. Gr. & S. 522.

The same principle has been recognized in the United States. So, where A. agreed to work for B. ten and a half months, and spin yarn at three cents per run, and afterwards left the service of B. before the expiration of the time, and brought an action against him for spinning 845 runs at three cents per run, it was held that the contract was entire and must be performed as a condition precedent before he could bring an action against B. for the price of the labor; *McMillan vs. Vanderlip*, 12 J. R. 165. The same principle was recognized in regard to a contract for hiring for a year; *Thorpe vs. White*, 18 J. R. 58; and the general doctrine, that where a special agreement subsists in full force the plaintiff cannot recover under the money counts, was again laid down in regard to an agreement to deliver whiskey, in *Raymond vs. Bearnard*, 12 J. R. 274. See, also, *Champlin vs. Rowley*, 18 Wend., 187. "The principle has been repeatedly recognized by the courts of this State, (New York) that where a party enters into a special contract which is entire, for the sale and delivery of property at a specified price, a full performance on his part is a condition precedent to his right of action against the vendee for the price of any part of the property delivered under the contract. *McKnight vs. Dunlop*, 4 Barb. S. C. R., 86. In Ohio, also, these decisions have been followed, and where the plaintiff agreed to deliver a whole crop of corn, payment to be made on a day certain after the delivery, he cannot recover for a part. *Witherow vs. Witherow*, 16 Ohio, 238.

So, again, where the plaintiff had agreed to clear and fence certain land for a specified sum within a given period, and after doing some of the work abandoned it, it was held that he could not maintain an action for the labor actually performed; *Jennings vs. Camp*. 18 J. R. 94; and the same principle was held in relation to an agreement to take charge of a certain brick-yard, and make a certain quantity of bricks for a given sum; *Clarke vs. Smith*, 14 J. R. 326. So also on an agreement to deliver pork; *Tuttle vs. Mayo*, 7 J. R. 132.

So, also, where the plaintiff agreed with the defendant to work for him for a year at ten dollars per month, and worked ten and a half months, and then left the defendant's employment on a Saturday, declaring he would work no longer. On Monday he returned and offered to work, but the defendant said he would employ him no more. Upon this, he sued the defendant for work and labor, and it was held he could not recover any thing. *Lantry vs. Parks*, 8 Cow. 63; *S. P. Monell vs. Burns*, 4 Denio 121. And again, in Massachusetts, where one Mansfield had agreed with Holbrook to erect and finish a barn by a certain time for a specified sum, and left the work unfinished, it was held that Mansfield could maintain no action, either on the contract or on a *quantum meruit*, against Holbrook. *Faxon vs. Mansfield*, 2 Mass., 147.

So, where the plaintiff agreed to work for the defendant for eight months for 104 dollars, or thirteen dollars per month, and quitted the service before the expiration of the time, it was held, in an action for work and labor, that he could not recover; *Reab vs. Moor*, 19 J. R., 887.

sure of remuneration. And the rule seems to be the same, whether the agreement has been departed from with or without

So in Pennsylvania, a person cannot recover for part performance of an entire contract, where he has failed in full performance on his part. *Martin vs. Schoenberger*, 8 Watts & Serg. p. 867.

So in Massachusetts, where the plaintiff agreed to work for the defendant for a year for 120 dollars, but before the expiration of the term left his service without the defendant's fault and against his consent, it was held that he could recover nothing, neither on the contract, nor upon a *quantum meruit*. *Stark vs. Parker*, 2 Pick., 267. And the same point was ruled in *Moses vs. Stevens*, 2 Pick., 282. So, too, *Thayer vs. Wadsworth*, 19 Pick., 849; *Olmstead vs. Beale*, 19 Pick., 528; *Davis vs. Maxwell*, 12 Met., 286. See contra in New York as to infants, *Whitmarsh vs. Hall*, 8 Denio, 875, because they cannot contract.

In a recent case it was said, "If the plaintiff agreed to labor for the defendants for one year and left their service at the end of six months, she could not maintain an action for the services actually rendered."—*Rice vs. Dwight, Manuf. Co.*, 2 Cushing, 80.

So in Vermont, "The contract being entire and executory, although the plaintiff has performed a part of it, yet having failed to perform the remainder without any sufficient excuse and without the consent of the defendants, he cannot recover either upon the special or general counts. *Jones vs. Marsh*, 22 Verm., 144; and *S. P. Kettle vs. Harvey and al.* 21 Verm., 801; and *Mullen vs. Gilkinson*, 19 Verm., 508. But illness, which incapacitates the plaintiff from performing his contract, lets him in to recover on a *quantum meruit*. *Seaver vs. Morse*, 20 Verm., 620.

In a recent case in the State of New York, where the plaintiff had agreed to deliver a specified quantity of hay at a given price, and only delivered part, and brought a suit for the value of that part, the learned Chancellor Walworth, however, held this language:

"The principle insisted upon is, that it is unconscientious and inequitable for a party who has been actually benefitted by the part performance of a contract, above or beyond the damages he has sustained by the non-performance of the residue of the agreement, to retain this excess of benefit without making the other party a compensation therefor; and that this excess of benefit, arising from the part performance of the other party, forms a new consideration, upon which the law implies a promise to pay for the same, and which excess of benefit, therefore, may be recovered in the equitable action of assumpsit. But if the nature of the part performance is such that the other party can reject the benefit received therefrom, as by offering to return specific articles received in part performance, but not actually converted or used, he is at liberty to do so, and to reserve his remedy for the non-performance of the contract. Courts of equity sometimes act upon a similar principle, in relieving a party against a penalty or forfeiture, arising from misfortune, or the neglect of a party to perform his agreement; and perhaps in some cases it has been done, where the forfeiture was incurred wilfully and intentionally, without any pretence of excuse arising from mistake or inability to perform. With the exception of this last class of cases, if courts of justice were at liberty to make new laws instead of administering those which are already in existence, and upon which the contract of the parties litigant is supposed to be founded, or if this was a new question upon which a court in this State was now to pass for the first time, in settling a principle upon the flexibility of the common law as applied to new cases, I see no reasonable objection to the transferring these principles of the court of chancery to the courts of common law, in cases of mere personal contract not founded upon agreements relative to the sale or transfer of an interest in real estate. But I consider this question as settled in this State by a uniform course of decisions, for the last twenty-five years, during which time the laws have undergone a most thorough revision by the legislature, without any attempt to change the law in this respect, as

mutual consent. So in a case in Massachusetts, where the plaintiff was allowed to recover on a *quantum meruit* for building a

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settled by the supreme court. I think it belongs, therefore, to the legislature, and not to this court, to make a change in the law in this respect, if such a change is deemed to be expedient and useful to the community. The only possible objection I can perceive to such a change, is that it may be a strong temptation to negligence in the performance of personal contracts, as the known practice of the court of chancery unquestionably is, with respect to agreements for the sale or purchase of real property." And it was held that the plaintiff could not recover. *Champlin vs. Rowley*, 18 Wend., 187.

And this case has very recently been affirmed in New York, where the suit was brought by a party contracting to deliver lumber by a day specified, but who delivered only part of it. *Page vs. Orr*, 5 Denio, 406.

In Louisiana, this subject is regulated by the provisions of their Code Act, 2720, 2721, *Angellon vs. Rivollet*, 2 La. Ann. R., 652.

On the other hand, in England and in this country, there is a class of cases which it is difficult, if not impossible, to reconcile with those just cited.

It is laid down as a general position in Buller's "*Nisi Prius*," 189, that if a man declare upon a special contract, and upon a *quantum meruit*, and prove the work done but not according to the contract, he may recover on the *quantum meruit*, for otherwise he would not be able to recover at all. And this general principle was recognized as law in *Cooke vs. Munstone*, 4 Bos. & Pull., 851, 855.

So it was held in England, that where there is an entire contract for the delivery of goods, and some of the goods have been delivered, and the vendee *does not return them*, upon the failure of the vendor to perform his part of the contract, the latter may bring an action for the value of the goods. *Shipton vs. Casson*, 5 Barn. & Cress., 378.

So, again, where the plaintiff had agreed to deliver to the defendant 250 bushels of wheat, and in fact only delivered 180, and brought suit for the quantity delivered, the King's Bench held he was entitled to recover—Lord Tentarden, C. J., saying, "If the rule contended for were to prevail, it would follow that if there had been a contract for 250 bushels of wheat and 249 had been delivered to and retained by the defendant, the vendor could never recover for the 249, because he had not delivered the whole." And Park, J., said, "where there is an entire contract to deliver a large quantity of goods, consisting of distinct parcels, within a specified time, and the seller delivers part, he cannot before the expiration of that time bring an action to recover the price of that part delivered; because the purchaser may, if the vendor fail to complete his contract, return the part delivered. *But if he retain* the part delivered after the seller has failed in performing his contract, the latter may recover the value of the goods which he has so delivered." *Oxendale vs. Wetherell*, 9 Barn. & Cres., 386. But this decision is not law in New York.

In *Champlin vs. Rowley*, 18 Wend., 187, above cited, Mr. Chancellor Walworth said, "This decision, carried to the extent it was in that case, cannot be considered as good law any where, for it is not founded upon any equitable principle, and is contrary not only to justice, but to common sense. The only way I can account for it is upon the supposition that the facts of the case are not properly stated in the report, or that the injustice of requiring the party who was not in fault to be at the expense of returning to the other party bulky articles of this description, or even of seeking him for the purpose of making an offer to return them, to protect himself from an action, was not presented to the consideration of the court."

So also in this country, it has been said that where there is an honest intention to pursue the contract, and a substantive execution of it, but some comparatively slight deviations as to some particulars provided for; if the partial performance of the contract is of any value or benefit to the other party, he who does the work may recover

house, the agreement not having been strictly adhered to, and the jury were told at the trial to consider what *the house was*

on a *quantum meruit*. So it was held in Massachusetts, on a building contract, *Hayward vs. Leonard*, 7 Pick., 181; and the same point was again decided on a similar contract, in *Smith vs. First Cong. Meeting House in Lowell*, 8 Pick., 178.

See in same State, a case where a plaintiff who had undertaken to build a bridge, but had departed from the contract and built it so unskilfully that it was carried away, and it was held that he could not recover on the contract because he had not pursued it, nor on the *quantum meruit*, because the defendants *had received no benefit from his labors*. *Taft vs. Inhabitants of Montague*, 14 Mass., 282. In the same State see *Moulton vs. Trask*, 9 Met., 577.

It is also settled in New York, by repeated decisions, that if there be a special agreement to do a piece of work, and the work be done, but not pursuant to such agreement either in point of time or any other respect, the party can recover what the work is reasonably worth on the common counts. So on an agreement to deliver, bore, and lay log water pipes, *Linningdale vs. Livingston*, 10 J. R., 86. So on a contract to construct a mill within a given time for a given sum, *Jewell vs. Schroepel*, 4 Cowen, 564. And on a contract to ship cotton, *Peltier vs. Sewall*, 12 Wendell, 886. And so in Iowa, *Davis vs. Fish*, 1 Iowa, 407; *Dubois vs. Delaware and H. C. Co.*, 4 Wend., 290; in Vermont, see *Myrick vs. Slason*, 19 Verm., 127.

And there is a very numerous class of analogous cases, which we shall have occasion to notice when we come to the subject of *Recoupment*, where, on the imperfect performance of an agreement, the defendant is allowed to recoup his loss in damages, thus recognizing the general principle, that the precise performance of the agreement is not necessary to entitle the plaintiff to recover.

The subject presents, indeed, one of the most vexed questions in the law, and though it regards, as I have said, perhaps more strictly the cause of action, or the right of the parties, than the measure of relief, it may not be improper to notice the mode in which the difficulty has been solved by the very learned and able supreme court of New Hampshire.

In an action for work and labor, it appeared that the plaintiff had agreed to work for the defendant one year for a given sum, and that before the expiration of the time agreed on, he had quitted his service without the defendant's consent, and on this he was held entitled to recover for the time he was employed. *Parker, C. J.*, after commenting on the extreme disagreement and want of harmony among the cases, and calling particular attention to those where a recovery had been allowed on partial performance of agreements to build, proceeded to say; *Button vs. Turner*, 6 N. H. R. 497.

"The cases for building, &c., are not to be distinguished, in principle, from the present, unless it be in the circumstance, that where the party has contracted to furnish materials, and do certain labor, as to build a house in a specified manner, if it is not done according to the contract, the party for whom it is built may refuse to receive it, elect to take no benefit from what has been performed, and therefore if he does receive he shall be bound to pay the value; whereas in a contract for labor merely, from day to day, the party is continually receiving the benefit of the contract under an expectation that it will be fulfilled, and cannot, upon the breach of it, have an election to refuse to receive what has been done, and thus discharge himself from payment.

"But we think this difference in the nature of the contracts does not justify the application of a different rule in relation to them.

"The party who contracts for labor merely, for a certain period, does so with the full knowledge that he must, from the nature of the case, be accepting part performance from day to day, if the other party commences the performance, and with knowledge also that the other may eventually fail of completing the entire term. \* \* It is said that in those cases where the plaintiff has been permitted to recover there was



worth to the defendant, and to give that sum in damages. On a motion for a new trial, this was held wrong, the court saying,

an acceptance of what had been done. The answer is, that where the contract is to labor from day to day, for a certain period, the party for whom the labor is done is truth stipulates to receive it from day to day, as it is performed, and although the other may not eventually do all he has contracted to do, there has been necessarily an acceptance of what has been done in pursuance of the contract, and the party must have understood when he made the contract, that there was to be such acceptance. \*

\* We have no hesitation in holding that the same rule should be applied to both classes of cases, especially as the operation of the rule will be to make the party who has failed to fulfill his contract, liable to such amount of damages as the other party has sustained, instead of subjecting him to an entire loss for a partial failure, and thus making the amount received, in many cases wholly disproportionate to the injury. \*

\* We hold, then, that where a party undertakes to pay upon a special contract for the performance of labor, or the furnishing of materials, he is not to be charged upon such special agreement until the money is earned according to the terms of it; and where the parties have made an express contract, the law will not imply and raise a contract different from that which the parties have entered into, except upon some further transaction between the parties.

"In case of a failure to perform such special contract, by the default of the party contracting to do the service, if the money is not due by the terms of the special agreement, he is not entitled to recover for his labor, or for the materials furnished, unless the other party receives what has been done, or furnished, and upon the whole case derives a benefit from it.

"But if, where a contract is made of such a character, a party actually receives labor, or materials, and thereby derives a benefit and advantage, over and above the damage which has resulted from the breach of the contract by the other party, the labor actually done, and the value received, furnish a new consideration, and the law thereupon raises a promise to pay to the extent of the reasonable worth of such excess. This may be considered as making a new case, one not within the original agreement, and the party is entitled to recover on his new case, for the work done, not as agreed, yet accepted by the defendant.

"If, on such failure to perform the whole, the nature of the contract be such that the employer can reject what has been done, and refuse to receive any benefit from the part performance, he is entitled so to do, and in such case, is not liable to be charged, unless he has before assented to and accepted of what has been done, however much the other party may have done towards the performance. He has, in such case, received nothing, and having contracted to receive nothing but the entire matter contracted for; he is not bound to pay, because his express promise was only to pay on receiving the whole, and, having actually received nothing, the law cannot and ought not to raise an implied promise to pay.

"But where the party receives value, takes and uses the materials, or has advantage from the labor, he is liable to pay the reasonable worth of what he has received. And the rule is the same, whether it was received and accepted by the assent of the party prior to the breach, under a contract by which, from its nature, he was to receive labor, from time to time, until the completion of the whole contract; or whether it was received and accepted by an assent subsequent to the performance of all which was in fact done. If he received it under such circumstances as precluded him from rejecting it afterwards, that does not alter the case; it has still been received by his assent.

\* \* The amount, however, for which the employer ought to be charged, where the laborer abandons his contract, is only the reasonable worth, or the amount of advantage he receives upon the whole transaction, and, in estimating the value of the labor, the contract price for the service cannot be exceeded.

“the house might have been worth the whole stipulated price, notwithstanding the departures from the contract. They should have been instructed to deduct so much from the contract price as the house was worth less on account of these departures.” And a new trial was granted.\*

So, also, where work is done under a special agreement at estimated prices, and there is a deviation from the original plan, by *the consent of the parties*, the contract is not excluded, but is made the rule of payment, as far as it can be traced, and for the extra labor the party is entitled to his *quantum meruit*. It has been thus decided, both in England† and in New York.

So, where performance of a special contract was prevented by the defendant, and suit brought on the general counts, the

“If a person makes a contract fairly, he is entitled to have it fully performed ; and if this is not done he is entitled to damages. He may maintain a suit to recover the amount of damage sustained by the non-performance.

“The benefit and advantage which the party takes by the labor, therefore, is the amount of value which he receives, if any, after deducting the amount of damage ; and if he elects to put this in defence he is entitled so to do ; and the implied promise which the law will raise, in such case, is to pay such amount of the stipulated price for the whole labor as remains after deducting what it would cost to procure a completion of the residue of the service, and also any damage which has been sustained by reason of the non-fulfilment of the contract.

“If in such case it be found that the damages are equal to, or greater than the amount of the labor performed, so that the employer, having a right to the full performance of the contract, has not upon the whole case received a beneficial service, the plaintiff cannot recover. \* \* There may be instances, however, where the damage occasioned is much greater than the value of the labor performed ; and if the party elects to permit himself to be charged for the value of the labor, without interposing the damages in defence, he is entitled to do so, and may have an action to recover his damages for the non-performance, whatever they may be.

“And he may commence such action at any time after the contract is broken, notwithstanding no suit has been instituted against him ; but if he elects to have the damages considered in the action against him, he must be understood as conceding that they are not to be extended beyond the amount of what he has received, and he cannot afterwards sustain an action for further damages.”

In Illinois, a different conclusion has been arrived at. In an action for work and labor, it appeared that the plaintiff had agreed to work for the defendant on his farm for eight months for ninety dollars ; but that he left the defendant's employment, without his consent or fault, at the end of four months. It was held that the plaintiff could not recover on a *quantum meruit* for the time during which he had actually bestowed his labor. And the court said, “It is no objection to say that the defendant has received the benefit of his labor, this being a case where, from its nature, the defendant could not separate the products of his labor from the general concerns of his farm, and ought not, therefore, to be responsible to any extent whatever for not doing that which was impossible. *Eldridge vs. Rowe*, 2 Gilman, 91.

\* *Hayward vs. Leonard*, 7 Pick., 181.

† *Robson vs. Godfrey*, 1 Holt N. P. C., 286.



court said, "the defendant may give the contract in evidence with a view to lessen the quantum of damages. So far as the work was done under the special contract, the prices specified in it are, as a general rule, to be taken as the best evidence of the value of the work. Where it does not appear that the work was rendered more expensive to the plaintiff than was contemplated when the contract was made, or than it otherwise would have been, in consequence of the improper interference of the defendant, or of his neglect or omission to perform what by the contract he was bound to do, the contract prices should be held conclusive between the parties. But if the defendant neglect to furnish the materials which he was to find in due time, so that the plaintiff is obliged to do his work at a less favorable season, and at an additional expense, such expense ought to be taken into consideration and added to the contract price."\*

But, where the work embraced in the contract is performed under circumstances more disadvantageous than was expected at the time of the estimate, the additional expense thus incurred should be added to the contract price. So, in a case where the plaintiff entered into a written contract with the defendants to construct a section of a canal, to receive nine cents per cubic foot for excavation, forty cents per cubic yard for rock, and eleven cents for embankment; and the defendants had so far rescinded the contract as to enable the plaintiff to recover in the form of a *quantum meruit*, the plaintiff was held at liberty to recover for excavating *hard pan* (that not being mentioned nor included in the contract), at the rate which it was worth; and to prove the value of his labor, in this respect wholly irrespective of the contract, the contract contained a provision that the judgment of the defendant's engineer should, in case of a difference between the parties, be conclusive; but this was held not to apply to the hard pan.†

And where the plaintiffs, contractors on a railroad, were stopped by the defendants, and it was impracticable to ascertain what sum would be due at the prices stipulated in the contract, because when the work was stopped a large portion of it

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\* *Koon vs. Greenman*, 7 Wend., 128.

† *Dubois vs. Delaware and Hudson Canal Co.*, 4 Wend., 285. S. C., 12 Wend., 334. And S. C. in Error, 15 Wend., 87. In Alabama, see *Aikin vs. Bloodgood*, 12 Alabama, 221.

was in such an unfinished state as to be incapable of measurement, the plaintiffs were held entitled to recover as on a *quantum meruit*, without reference to the rate of compensation specified in the contract.\*

So, also, if the contract is rescinded, one party stopping the work while the other is ready to proceed. In this case he is at liberty to prove the value of his services, but the contract is, nevertheless, not to be altogether disregarded. So, where the plaintiff had agreed with the defendants to make a section of an aqueduct, to be paid one dollar per cubic yard for rock excavation, the defendants stopped the work when about half of it was done. The plaintiff proved that he had lost on the part of the work which he had executed (that being the most expensive), estimating it at the contract price of one dollar per yard, the sum of \$46,800, and that he would have made a profit on that portion of the contract which remained to be executed when the work was suspended, equal to the amount of his loss on the work done, and it was held that he was entitled to recover that sum, \$46,800.†

It is proper here to notice generally, in regard to executory contracts for the delivery of property at a future day, that if the article does not come up to the agreement, the vendee may return it and sue for damages; differing in this respect from such sales with warranty, when if the warranty is broken the party cannot return the article, but is left to his action on the agreement.‡ We shall have occasion to notice this again when we come to speak of warranty of personal property.

In Georgia, it has been held in an action brought by the overseer of a plantation engaged for a limited time, and dismissed without cause, that his remedy was three fold: that he might either bring an action at once for any special injury sustained by reason of the breach of the contract; or secondly, that he might wait till the end of the period for which he was engaged, and recover his whole wages; or thirdly, that he

\* *Derby vs. Johnson*, 21 Verm. R., 17.

† *Clark vs. The Mayor, &c.*, 8 Barb. S. C. R., 288. This case was reversed on appeal, 4 Comstock, 888, on the ground that where the contractor elects to consider the contract as rescinded, and sues for work and labor generally, he cannot recover profits, and the rule of damages is the actual value of what has been done.

‡ *Freeman vs. Clute*, 8 Barb. S. C. R., 424.

a compensation for the non-performance of the covenant through all future time, so as to bar further suits.\*

But it has been held by the same court, that all the breaches which have actually taken place, must be embraced in the first suit; and that even if they are not, a second suit will not lie for them.†

In a recent case in New York, a bond had been given conditioned to furnish the plaintiffs their support during their natural lives, and it was held that a failure by the obligor to provide for the obligee according to the covenant, amounted to a total breach, and that full and final damages might be recovered.‡

It appears, therefore, that in debt for money payable by instalments the action will not lie till all the sums are due, but that in assumpsit an action may be brought for each sum as it becomes payable; that in agreements to do certain acts for a continuing period of time, an action may be brought for each breach, and damages for each of the breaches separately assessed, but that all the breaches actually committed must be declared for in one suit.

There is still another class of cases, viz: where the contract covers a long space of time, and during that period the value of the thing in controversy has fluctuated. Thus, in a case in New York, which we have already had occasion to notice in reference to another branch of our subject,§ the plaintiff, in 1836, agreed to furnish and deliver marble to build a City Hall, at successive periods in five successive years. In 1837 the defendants refused to receive any more, and it was shown that the difference between the cost of the marble and the contract price, which was the measure of damages, had fluctuated considerably in the five years. On this state of facts, the circuit judge charged, that, "In fixing the damages to be allowed the plaintiffs, the jury were to take things as they were at the time the work was suspended, and not allow for any increased benefits they would have received from the subsequent fall of

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\* *Crain vs. Beach*, 2 Barb. S. C. R., 120, and S. C. on Appeal, *Beach vs. Crain*, 2 Comstock, 86; and see, also, *Fish vs. Folly*, 6 Hill, 54.

† *Bendernagle vs. Cocks*, 19 Wend., 207. *Bristowe vs. Fairclough*, 1 Man. & Gr., 143. *Pinney vs. Barnes*, 17 Conn., 420.

‡ *Shaffer vs. Lee*, 8 Barb. S. C. R., 418, where the cases are collected at large.

§ *Masterton vs. Mayor of Brooklyn*, 7 Hill, 62. *Supra*, 74.

wages or subsequent circumstances.” And of this opinion was the majority of the court, on a motion for a new trial.

Nelson, Ch. J., who delivered the leading opinion, said :

“ It has been argued that, inasmuch as the furnishing of the marble would have run through a period of five years, of which about one year and a half only had expired at the time of the suspension, the benefits which the party might have realized from the execution of the contract, must necessarily be speculative and conjectural ; the court and jury having no certain data upon which to make the estimate. If it were necessary to make the estimate upon any such basis, the argument would be decisive of the present claim. But in my judgment no such necessity exists. Where the contract, as in this case, is broken before the arrival of the time for full performance, *and the opposite party elects to consider it in that light*, the market price on the day of the breach is to govern in the assessment of damages. In other words, the damages are to be settled and ascertained according to the existing state of the market at the time the cause of action arose, and not at the time fixed for full performance. The basis upon which to estimate the damages, therefore, is just as fixed and easily ascertained in cases like the present, as in actions predicated upon a failure to perform at the day.” P. 71.

And Bronson, J., said :

“ There may have been fluctuations in the prices of labor and materials, between the day of the breach and the time when the contract was to have been fully performed, and this makes the question upon which my brethren are not agreed. I concur in opinion with the chief justice, that such fluctuations in prices should not be taken into the account in ascertaining the amount of damages, but that the court and jury should be governed entirely by the state of things which existed at the time the contract was broken. This is the most plain and simple rule ; it will best preserve the analogies of the law, and will be as likely as any other to do substantial justice to both parties.” P. 76.\*

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\* Beardsley, J., however, dissented, saying : “ The plaintiffs were not bound to wait till the period had elapsed for the complete performance of the agreement, nor to make successive offers of performance, in order to recover all their damages. They might regard the contract as broken up so far as to absolve them from making further efforts to perform, and give them a right to recover full damages as for a total breach. I am not prepared to say that the plaintiffs might not have brought successive suits on this covenant, had they from time to time made repeated offers to perform on their part, which were refused by the defendants ; but this the plaintiffs were not bound to do.”

“ There can be no serious difficulty in assessing damages according to the principles which have been stated. The contract was made in 1836 ; and, according to the testimony, about five years would have been a reasonable time for its execution. That time has gone by. The expense of executing the contract must necessarily depend upon the prices of labor and materials. If prices fluctuated during the period in question, that may be shown by testimony. In this respect there is no need of resorting

The decision in this case has been adhered to in New York,\* and it has been cited with approbation and its authority recognized in Louisiana.†

In a case in Vermont, the rule was laid down as follows: The defendants, a bridge company, had, in September, 1830, agreed with the plaintiffs, to keep a bridge in repair for twelve years, on the plaintiffs paying twenty-five dollars every year. The plaintiffs paid the annual sum till 1838, when the defendants ceased to repair; and the judge charged at the trial, that the jury "should limit their inquiries to the time when both the parties ceased in fact to act under the contract." But on motion for a new trial, the court said, "the rule of damages in this case should have been, to give the plaintiffs the difference between what they were to pay the defendants, and the probable expense of performing the contract, and thus assess the entire damages for the remaining twelve years."‡

Perhaps, on principle, a distinction should be made among agreements of this class. Where they are intrinsically indivisible, as in the case of a building contract, for instance, one refusal may properly be considered as an absolute breach; and then there are very strong reasons for adopting the decision of the Supreme Court of New York. As a general rule, it is the time of breach which fixes the liability in cases of personal

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to conjecture; for all the data necessary to form a correct estimate of the entire expense of executing the contract, can now be furnished by witnesses.

"If the cause had been brought to trial before the time for completing the contract expired, it would have been impracticable to make an accurate assessment of the damages. This is no reason, however, why the injured party should not have his damages; although the difficulty in making a just assessment in such a case, has been deemed a sufficient ground for decreeing specific performance. No rule, which will be absolutely certain to do justice between the parties, can be laid down for such a case. Some time must be taken arbitrarily, at which prices are to be ascertained and estimated; and the day of the breach of the contract, or of the commencement of the suit, should perhaps be adopted under such circumstances. But we need not, in the present case, express any opinion on that point. No conjectural estimate is required to ascertain what would have been the expense of a complete execution of this contract; but the state of the market, in respect to prices, is now susceptible of explicit and intelligible proof. And where that is so, it seems to me unsuitable to adopt an arbitrary period; especially as the estimate of damages must, in any event, be somewhat conjectural."

In *Shaffer vs. Lee*, 8 Barb. S. C. R., 417, Mr. Justice Hand said of this case, "As I understand the opinions delivered, all the judges considered the plaintiff entitled to recover entire and final damages for the non-fulfilment."

\* *N. Y. & H. R. R. Co. vs. Story*, 6 Barb. S. C. R., 419.

† *Seaton vs. Second Municipality*, 8 La. Ann. R., 45.

‡ *Royalton vs. R. & W. Turnpike Co.*, 14 Vermont, 311.

contract; if the periods specified in the contract have not arrived before the trial of the cause, any effort to fix the rights of the parties at those various times, must be mere matter of conjecture; and "*probable expense*," in the language of the decision just cited, is neither a precise nor a safe direction for a jury. But if, on the other hand, the contract is, in its nature, capable of division, as to deliver the crops of a farm for several successive years, and if the periods have arrived before suit brought, there seems no reason why several actions may not be brought for every refusal to perform, nor why the damages should not be estimated as at every period fixed for performance.\*

With the modifications thus noticed, the rule is adhered to, that the contract furnishes the standard of compensation; and the other general rule is equally true that the actual loss sustained by the plaintiff is the measure of damages.

But to this rule, also, there are exceptions which require to be noticed; and the principal one grows out of the question how far the plaintiff can recover for loss which he is liable to sustain. There is no doubt that a mere probability of future loss is insufficient to lay the basis of a claim for legal relief. But the case may be different where the plaintiff is fixed with a legal liability to loss which, whenever consummated, the defendant will be bound to make good. The question here is, can suit be brought before the injury is actually consummated.

Some exceptions to the general rule, which requires proof of actual loss, have been made in actions on policies of insurance. Thus it has been held, that a party insured can recover his contributory share of general average from the underwriter, although he has not paid it, and his interest in the voyage, cargo, freight, or vessel is only liable to pay it.† So a

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\* In England, it has been several times held in Chancery, in regard to future agreements, that the difficulty of arriving at any true rule of damages is a good ground for a decree for specific performance. *Buxton vs. Lister*, 8 Atk., 883, and *Taylor vs. Neville*, cited therein. *Ball vs. Coggs*, 1 Bro. Parl. Cas., 296, and *Adderly vs. Dixon*, 1 Sim. & Stuart, 607. In this last case, the Vice-Chancellor said, "the profit on the contract being to depend on future events, cannot be correctly estimated in damages, where the calculation must proceed upon conjecture. Damages might be no complete remedy, being to be calculated merely by conjecture." This language seems to imply that, at law, the whole period of the contract would be inquired into, on the principle of the Vermont decision.

† Phillips on Insurance.

party in possession of a house, under a contract of purchase, can recover the whole sum insured against fire, although he has paid but a small part of the purchase money, and is only liable to pay the balance.\* So the re-assured has been held at liberty to sue and recover from the re-assurer the full amount insured, although the re-assured had not repaid it, and from his insolvency could not by possibility do so.† So the importer has been allowed to recover from the underwriter the value of his goods destroyed by fire, including duties, though the duties had not been paid.‡ So, too, as we have already seen,§ the defaulting party to an agreement to convey land has been, in England, made to pay the attorneys' and brokers' bills, for which the plaintiff had merely become liable. So in Louisiana, the sureties in a sequestration bond have been adjudged to pay the counsel fees for which the plaintiff in the original suit was only liable.¶

Other analogous decisions have been made which we shall have occasion to consider, when we come to the subject of principal and surety,\*\* but it appears to me, that the principle that actual loss should be sustained, cannot be much farther relaxed without effacing the line which separates equitable from legal relief. As a general rule, the latter awards damages for injury actually done : anticipation and prevention belong to equity.

We have thus far spoken of express contracts made by the parties : we have still to speak of the agreements which, in the absence of any express stipulation, the law implies from a given state of facts. Where property has been transferred or services rendered by one party to another, the law implies a promise to pay what the thing or the property is worth. The party then recovers, to use technical language, on a *quantum meruit* or a

\* The *Ætna Fire Co. vs. Tyler*, 16 Wend., 385.

† *Hone et al. vs. The Mutual Safety Ins. Co.*, 1 Sandford's Sup. Ct. Rep., 137.

‡ *Wolfe vs. Howard Ins. Co.*, 1 Sandford's Sup. Ct. Rep., 124.

§ *Supra*, 106.

| *Jones vs. Doles*, 8 La. Ann. R., 538.

¶ *Vide post*. But the rule being settled that the plaintiff can only recover for actual loss, nice questions often present themselves as to the nature of the evidence requisite to establish his loss ; whether the proof must be definite and absolute, so as to amount to mathematical certainty, or whether the tribunal should be satisfied with an approximative conviction. This subject we shall examine when we come to treat of evidence. In the mean time, I shall refer the reader to the sagacious observations of Mr. Justice Story, in *Rogers vs. Mech. Insurance Co.*, 1 Story, 609.



*quantum valebat*; and the measure of damages becomes a question of evidence as to the value of the property or services. Nor can this rule be varied, except by express agreement. Thus, where a father, whose infant daughter was employed by a manufacturing company at a considerable distance from his residence, forbade them to employ her any longer, and gave them notice that if they did so he should demand a given sum for her time and labor, it was held in an action of *assumpsit* against the company, that the notice was unavailing to fix the measure of compensation, and that he could only recover what her services were reasonably worth.\*

The common-law remedies for the violation of contracts are furnished by the actions of *assumpsit*, debt, and covenant, according to the form of the agreement, whether sealed or unsealed, and to the character of the demand, whether for sums certain, or for an undetermined amount. A line of division more satisfactory, however, than that resulting from the forms of actions, may be derived from the character of the agreement itself, as to the liquidation of the damages. There is a large class of cases where the parties, either by direct language or by the use of the technical form of the bond and penalty, undertake to fix the amount of remuneration, or at least to determine a limit which it shall not exceed. This class of contracts we shall consider after we have examined those where the damages are entirely at large, the parties not having fixed the compensation for a breach, and where the burthen of this duty is thrown entirely upon the court. While adhering, however, as far as possible to this division founded on the nature of the contract, it is impossible altogether to disregard the character of the proceeding in which the question is presented; for, as has been already noticed, and as we shall have frequent occasion to see, the same claim may be presented in very different forms, and the measure of relief will vary with the action made use of.

Of the action of account it would be superfluous to take any extensive notice here, "It is laid down in divers cases," says Mr. Sayer, "that no damages are recoverable in it."†

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\* *Adams vs. Woonsocket Co.*, 11 Met., 827.

† Sayer, ch. 9, 89. Bro. Dam. Pl., 186, Pl., 166. Dal., 18, Pl., 12. 1 Rol. Abr., 571, Pl., 17.



But on this point there is much conflict in the old books; and inasmuch as the proceeding in its original shape has become almost, if not entirely obsolete, it is believed, in this country, it is not necessary to pursue the enquiry.\*

The great action of assumpsit, although of comparatively recent origin, is of very different importance;† and under this head we shall have occasion first to consider the rule of damages in relation to bills and notes, insurance, sales of chattels, principal and surety, and the rights and liabilities of common carriers.

The action of covenant differs materially from that of assumpsit, in its requisition of a seal to the contract; but as this variation in the form of the agreement has no influence on the measure of relief, we shall be able to consider the rules of damages in that form of action, conjointly with assumpsit, reserving for separate examination the consideration of a very limited class of cases, which are presented in that form of proceeding only.

First, then, of negotiable paper.‡

\* In New York, by the Revised Statutes, vol. 2, 885 and 118, an effort was made by simplifying the practice in this action to re-introduce it, in the hope, perhaps, that it might to some extent supersede the expensive and dilatory remedy in equity, but the attempt did not succeed.

† The action of assumpsit was first held right in Slade's case, 44 Eliz., 4 Co., 92 b, previous to which the action of debt was used. "The action of assumpsit was established in Slade's case," said Sir Jas. Mansfield, Ch. J., in *Max vs. Roberts*, 5 Bos. & Pul., 454. See, also, Lord Loughborough's opinion, in *Rudder vs. Price*, 1 H. Bl., 547.

‡ An interesting and valuable work has recently been published at New Orleans, entitled *The Civil Law of Spain and Mexico*, by *Gustavus Schmidt*. It contains a brief but useful sketch of the gradual growth of the Spanish jurisprudence, and its introduction on this continent, and the modifications it has here undergone. Among the texts in regard to damages on breach of contract, are the following:

"Art. 437. When one of the parties, who has fulfilled his part of a contract, desires to rescind it, on account of the non execution on the part of the other, he is entitled to indemnity for the injury he has sustained by such non-execution.

Art. 438. The obligor in such a case is bound to pay indemnity, unless he prove that the execution of the contract was rendered impossible by some unforeseen *vis major*.

Art. 439. The indemnity is fixed by the creditor himself, with the approbation of the judge who taxes the same."

This last provision curiously accords with the original rule of the Roman law, in which, as we have seen, the measure of damages was fixed by the plaintiff himself: *in infinitum jurare potuit*. Supra, 25. I confess, until I discovered this analogy, I thought there must be some misunderstanding of the civil law, and that no jurisprudence could ever have tolerated such an enormity. Mr. Schmidt's work will well repay perusal and examination. His introduction bears marks of study and careful reflection.

## CHAPTER VIII.

### THE MEASURE OF DAMAGES IN ACTIONS UPON PROMISSORY NOTES AND BILLS OF EXCHANGE.

On Promissory Notes the legal rate of interest fixes the measure of damages. Questions—when the currency is altered—when the contract is made in one country and the suit is brought in another—when the amount of recovery depends on the consideration paid or received—Rule of Damages on Bills of Exchange—Reëxchange fixed in the United States generally by Statute.

THE subject of negotiable paper is so amply discussed in the various treatises devoted to this particular branch of the law, that it will be only necessary for us in this place to take a brief view of the general principles regulating the compensation awarded for the breach of contracts of this class.

In actions brought on promises to pay a liquidated sum of money, as on promissory notes or bills, where no question arises as to the currency or rate of exchange, the rule of damages is a fixed and arbitrary one. It is identical with the rate of legal interest. The actual damages may be much greater; the non-performance of the obligation may have occasioned the greatest distress, nay, even extreme positive loss; it may have produced actual insolvency. These remote results the law, however, does not investigate. It takes the rate of interest as the measure of damages; and so, says Pothier: "as the different damages which may result from the failure to perform this kind of obligation vary infinitely, and as it is as difficult to foresee as to excuse them, it has been found necessary to regulate them as by a species of penalty, and fix them at a precise sum."\*

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\* *Traité des Oblig.*, Part I., Ch. II., Art. 8, 170. "Comme les differens dommages et interêts qui peuvent resulter du retard de l'accomplissement de cette espèce d'obligation varient à l'infini, et qu'il est aussi difficile de les prévoir que de les justifier, il a été nécessaire de les regler, comme par une espèce de forfait, à quelque chose de fixe."

With this, the general language of the modern civil law accords. The damages resulting from the non-performance of contracts to pay money, are limited to the infliction of interest.\* “Interest,” says Domat, “is the name applied to the compensation which the law gives to the creditor who is entitled to recover a sum of money from his debtor in default.” So, too, the Roman law : *In bonæ fidei contractibus usuræ ex mora debentur.*†

These principles, equally recognised by our system, are embodied in the French Code by a positive provision,‡ the correctness of which is thus supported and expounded by one of the ablest commentators on that law :

“It is certain that the non-payment of money when due may cause, and often actually causes the creditor loss much beyond the legal interest on the sum. For want of the funds on the receipt of which his calculations are made, he may have been compelled to borrow, himself, and to submit to the exactions of the usurer. He may have been prosecuted in a manner calculated to destroy his credit. He may have been ejected from his property ; have become bankrupt ; his house may have gone to ruin for want of repair. He may have lost highly advantageous bargains.

But how are we to distribute these losses according to their real cause, and fix on those which should be imputed to the party in default ? How is any equitable valuation to be made of them ? Add to this, that the non-payment of money is the most common of all cases which give rise to damages, and we shall perceive that the peace of society would be harassed by this infinite multitude of settlements, and the litigation that would result from them.

The law prevents this by declaring that the damages shall never exceed legal interest from the day that payment becomes due ; and this, which is a species of forfeiture, may often be advantageous to the creditor.

Whatever may be the damage that he has suffered by the delay in receiving his funds, whether the debtor was animated by malicious or even fraudulent motives, the creditor cannot, it is true, demand any other compensation than legal interest on his demand. But on the other hand, he is not required to prove the damages that the delay may have caused. And this pro-

\* Liv. III., Tit. V., § 1.

† L. 82, § 2, Ff. De usur.; propter moram. L. 17, § 8, in fine eodem.

‡ Art. 1153. Dans les obligations qui se bornent au paiement d'une certaine somme, les dommages et intérêts résultant du retard dans l'exécution ne consistent jamais que dans la condamnation aux intérêts fixés par la loi, sauf les règles particulières au commerce et au cautionnement.

Ces dommages et intérêts sont dus, sans que le créancier soit tenu de justifier d'aucune perte.

Il ne sont dus que du jour de la demande, excepté dans les cas où la loi les fait courir de plein droit. Code C., § 1153.

vision, which fixes the measure of damages for the non-payment of money at legal interest, is founded on a principle of equity.

In cases of the non-performance of other contracts, the party in default, as the lessee who violates his contract of letting, or the architect who, by his negligence, causes the destruction of a house, must be fully apprised of the nature of the loss that may result from the non-performance of his duty ; whereas with money it is different.

On the contrary, the engagement to pay a sum of money has no precise relation to any particular damage ; it is impossible to know what will result from its non-payment ; it is impossible to see what the creditor will lose, or how much he will lose ; whether he will be compelled to borrow—whether he will be driven from his house and reduced to bankruptcy—whether his business or his credit will suffer ; it is impossible to predict any one event among the thousand which are possible, and which depend upon the situation of the creditor's affairs.

Money being the common measure of all things, has not, like other things, any peculiar function. It takes the place of all other things. The loss experienced, then, by those who are not paid at maturity, is as diversified as the use that they might make of the money, and as unforeseen as the wants from which the injury might arise. They are, in regard to the debtors, like fortuitous cases, impossible to foresee, and which for this reason their obligation does not embrace.”\*

\* Touillier, vol. 6, liv. 3, tit. 3, ch. III. De l'effet des Obligations, 274, et seq. “Il est pourtant certain que le défaut de paiement d'une somme au terme fixe peut causer, et cause souvent, au créancier des pertes fort supérieures à l'intérêt légal de son argent. Faute de la somme sur laquelle il comptait, il a pu être réduit à emprunter lui même, et à subir la loi d'un usurier avide. Il a pu se voir traduit en justice par une action qui a porté une atteinte mortelle à son crédit, se voir exproprié, faire faillite, voir périr sa maison faute de moyens pour la réparer, manquer des marchés avantageux, &c., &c., &c.

“Mais comment assigner à ces pertes leur véritable cause, et discerner celles qui doivent être imputées au débiteur en retard ? Comment en faire une évaluation équitable ? Ajouter à cela que le défaut de paiement d'une somme due est le plus fréquent de tous les cas qui donnent lieu à des dommages et intérêts, et l'on verra que la paix de la société serait troublée par cette multitude infinie de liquidations différentes et par les procès qui en seraient la suite. La loi les prévient, en statuant que les dommages et intérêts ne pourront jamais consister que dans l'intérêt légal de la somme à compter du jour de la demande. C'est une espèce de forfait qui peut souvent être avantageux au créancier.

“Quelque soit le dommage qu'il souffre par le défaut de rentrée de ses fonds, soit qu'il n'y ait qu'une simple négligence, soit qu'il y ait de la part du débiteur contumace affectée ou même dol, le créancier ne peut à la vérité demander d'autre indemnité que l'intérêt légal de son argent ; mais aussi il n'est pas assujéti à justifier le dommage que ce retard lui a causé.

“Cette disposition de la loi qui fixe l'indemnité à l'intérêt légal des sommes dues est encore fondée sur un principe d'équité qu'il faut développer.

“Au contraire, l'engagement de ceux qui doivent une somme d'argent n'a de rapport précis à aucun dommage particulier ; on ne voit pas ce qui doit arriver faute de paiement ; on ne peut prévoir ni si le créancier en souffrira ni ce qu'il en souffrira, en cas qu'il en souffre, s'il sera forcé d'emprunter, s'il sera exproprié ou réduit à une

And it should be borne in mind, as Pothier also well remarks, that if on the one hand the creditor cannot recover any thing beyond the legal interest, so on the other hand he is not put to any proof of damage whatever.\* It is an arbitrary assessment of damages in the nature of the *Lex Aquilia* of the Roman system. He can, it is true, recover but the legal rate of interest; but then, on the other hand, he might in fact not have been able to gain any interest whatever, during the time he has been deprived of his funds.

"It is a dictate of natural justice and the law of every civilized country, that a man is bound in equity not only to perform his engagements, but also to repair all the damages that accrue naturally from their breach. Hence, every nation, whether governed by the Civil or Common law, has established a certain common measure of reparation for the detention of money not paid according to contract, which is usually calculated at a certain and legal rate of interest."†

Such is the language of the Supreme Court of the United States; but it is to be taken with much allowance. The thunders of the early Church‡ were levelled against interest and usury indiscriminately, and up to the time of Henry VIII., as we are told by Lord Mansfield,§ "all interest on money lent was pro-

faillite, s'il éprouvera des pertes dans son crédit, dans son commerce, ou tel autre événement entre mille possibles qui dépendent de la situation des affaires du créancier.

"L'argent par sa nature étant le prix commun de toutes les choses, n'a pas comme elles un usage particulier. Il tient lieu à chacun de toutes celles dont on a besoin. Les dommages qu'éprouvent ceux qui ne sont pas payés au terme, sont donc aussi diversifiés que l'usage qu'ils pourraient faire de leur argent, et aussi imprévus que les besoins d'où ces dommages peuvent naître. Ils sont à l'égard des débiteurs comme des cas fortuits qu'ils n'ont pu prévoir, et que par cette raison leur obligation ne renferme point."

\* So says the civil code of Louisiana, "The damages due for delay in the performance of an obligation to pay money, are called interest. The creditor is entitled to these damages without proving any loss, and whatever loss he may have suffered he can recover no more."—*Art. 1929.*

† *Curtis vs. Innerarity*, 6 Howard, 146.

‡ See Voltaire's article, *Intérêt*, in the *Dictionnaire Philosophique*, where he represents a Jansenist Abbé remonstrating with a Dutch merchant against taking interest: "*Prenes garde; vous vous damnez; l'argent ne peut produire de l'argent; nummus nummum non parit.*" The hostility of the church was founded on the prohibition in the Old Testament, "Thou shalt not lend upon usury to thy brother."—*Deut., Chap. XXIII., v. 19, 20.*

§ *Lowe vs. Waller, Doug.*, 786, 740.

hibited by the common law, as it is now in Roman Catholic countries.”\* This statute simply provided that none should take for any loan or commodity above the rate of ten pounds for one hundred pounds for one whole year, which rate was reduced to five per cent. by a subsequent statute, passed in the reign of Queen Anne.†

I shall consider the rule of damages in regard to promissory notes and bills of exchange, separately.‡ In regard to the former, the measure of damages being fixed at the rate of interest, if the currency at the time and place of payment be the same as at the time and place of contract, it would seem that no question could arise; but it sometimes happens that between the date and maturity of a promissory note a change takes place in the value of the coin or currency in which it is made payable, even in the same country. In such a case, it seems, in England the note will be discharged by a due payment in any coin which by law is made of equivalent value at the time of payment.§

So again, where a contract is made in one country and is payable in the currency of that country, and a suit is afterwards brought in another country to recover for a breach of the contract, a question often arises as to the manner in which the amount of the debt is to be ascertained, whether at the nominal or par value of the currencies of the two countries, or according to the rate of exchange at the particular time existing between them; as, for instance, a debt of £100 is contracted in England and is payable there, and afterwards a suit is brought in America for the recovery of the amount. And on this subject there is considerable diversity of opinion among the courts of this country. In New York and in Massachusetts, it has been distinctly held, that the debt is to be paid according

\* See, also, *Robinson vs. Bland*, 2 Burr., 1077, 1086.

† 12 Anne, Stat. 2, c. 16.

‡ It will be remembered, that Mr. Justice Story has given the high authority of his precept and example to a complete division of all discussions as to bills and notes, by the separate treatises which he has presented to the profession on these subjects.

§ Story on Notes, § 390, where the opinion of the continental jurists will be found. *Case of the Mixed Money*, Sir John Davies' Reports, 28, [48.] *Pilkington vs. Commissioner for Claims on France*, 2 Knapp's R., 7, 18, 19. S. C., 2 Bligh R., 98. *Cokerell vs. Barbor*, 16 Ves., 461, 465. Story on Con. of Laws, § 812; on Bills, § 168. *Warder vs. Arell*, 2 Wash. Virg. R., 359, 288. *Searight vs. Calbraith*, 4 Dall., 325. *Bartsch vs. Atwater*, 1 Conn. R., 409. 1 Brown's Ch. R., 376.

to the par and not the rate of exchange, and that the creditor is not entitled to any allowance on account of the difference of exchange between the country where the suit is brought and the country where the debt was payable.\* While on the other hand, Mr. Justice Washington, on the Pennsylvania circuit, and Mr. Justice Story, on the Massachusetts circuit, have both held that the creditor was entitled to recover at the rate of exchange.†

There is also a large class of cases where the amount of recovery depends on the question of consideration paid for the security, whether it be a bill or a note, or on the fact whether it was in whole or part given for the accommodation of the party who sues.

“In general,” says Mr. Chitty, “between the original parties, or a holder who has not given full value, the defendant is at liberty to show that he drew, accepted, endorsed, or made the bill or note for the accommodation of the plaintiffs, or of one of them, or of a person for whom he is a trustee, who either expressly or impliedly engaged to provide for the bill; or the defendant may show that he received no consideration, or none that was in point of law adequate, and thus may entirely defeat the action, or reduce the claim.”‡ Therefore, where the defendant accepted the bill for the accommodation of the plaintiff, except as to a part; and where the plaintiff, as endorsee, had only advanced a part of the money made payable by the bill accepted for the endorser’s accommodation, neither was allowed to recover more than he had advanced.§ But the consideration of this subject, in truth, appertains more properly to the right of recovery than the measure of damages; and it is, moreover, so abundantly discussed in the treatises to which I have already referred, that it is only necessary here to advert to it.

It seems that where a party sells a note for a valuable consideration, there is an implied warranty that the parties whose

\* *Martin vs. Franklin*, 4 J. R., 125. *Scofield vs. Day*, 20 J. R., 102. *Adams vs. Cordis*, 8 Pick., 260.

† *Smith vs. Shaw*, 2 Wash. Cir. C. Rep., 167 and 168. *Grant vs. Healy*, 8 Sumner, 528. See, also, *Lanusse vs. Barker*, 8 Wheat., 101, 147. *Woodhall vs. Wagner*, 1 Bald. R., 290 and 309. *Story on Notes*, § 396. *Scott vs. Bevan*, 2 B. & Adol., 78. *Delegal vs. Naylor*, 7 Bing., 460. *Ekins vs. E. India Co.*, 1 P. Wms., 396. *Lee vs. Wilcocks*, 5 Serg. & Rawle., 48. *Cash vs. Kennion*, 11 Vesey, 314.

‡ Chitty on Bills, 8th English edition, 81.

§ *Darnell vs. Williams*, 2 Stark. R., 166. *Wiffen vs. Roberts*, 1 Esp. R., 261.



names appear on it, are able to make a valid contract; and so, where the defendant had procured a minor to endorse a note and then put it in circulation, he was held liable for its amount.\*

In the United States, notes are frequently given payable in specific articles; and on instruments of this form a doubt has arisen whether they should be treated as to be paid in money, or as contracts for the delivery of goods. In New York, notes were given in this form: "I promise to pay seventy-nine dollars and fifty cents, on the first day of January, in salt, at fourteen shillings per barrel." The Supreme Court† held this to be a contract for the delivery of salt, and that the value of the salt was the true measure of damages; thus, 45 barrels and  $\frac{1}{2}$  of a barrel would have discharged the note, at 14 shillings a barrel; and so, if salt had been only a dollar per barrel, at the time specified for payment, or delivery, the same quantity would discharge the note; the value, then, of 45 barrels and  $\frac{1}{2}$  of a barrel, was the rule of damages. The Court of Errors, however, held the instrument not to be a contract for the delivery of salt at all events, but intended to give the party his election to pay the sum expressed in money, or in salt; and that as the defendant had neglected to avail himself of the privilege of paying in the specific article, the payment of the principal debt and interest must give the true measure of damages, and the judgment of the court was reversed.‡

So, too, in Connecticut, on a promissory note to pay "two hundred and fifty dollars in brown cotton shirting at the rate of thirty cents a yard," the defendant offered to prove that the shirting, at the time and place fixed for payment, was worth only twenty cents a yard. But the evidence was excluded; the court holding that the instrument was an acknowledgment of a debt for the sum named, with an option to pay it in a

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\* *Lobdell vs. Baker*, 8 Met., 469. *Thrall vs. Newell*, 19 Verm., 202.

† *Gleason vs. Pinney*, 5 Cowen, 152; *S. C. in Error*, 5 Wend., 898, and *Clark vs. Pinney*, 7 Cowen, 681.

‡ A similar contract was construed differently, and, according to the views of the Supreme Court of New York, in Pennsylvania, in *Edgar vs. Bois*, 11 Serg. & R., 445; and in Tennessee, *McDonald vs. Hodge*, 5 Haywood's T. R., 85. In Maryland it has been held, that in an action for breach of contract to make payment in tobacco, the plaintiff shall recover the value of the tobacco on the day appointed for payment. *Lyle vs. Lyle*, 1 Har. & J., 278.



certain way, which option the defendant had failed to take advantage of; and that consequently, the promise was to be regarded as a naked agreement to pay the money.\* And in Vermont it has been recently said, "that in that State, by an uninterrupted series of decisions, notes payable in specific articles of property, after the time of payment has elapsed seem to stand much in the same condition as notes payable in money, except in their lack of negotiability;" and the plaintiff was held entitled to recover under the money counts.†

But a note given in South Carolina, "to deliver to the plaintiff or order such number of barrels of new rice as will amount to the sum of two hundred dollars, value received this day, at one dollar per cwt.," was held to be clearly a contract for the delivery of rice, and the measure of damages was held to be the value of the rice, at the time it was to be delivered, which exceeded considerably the value fixed by the note.‡

In New Hampshire, too, the doctrine is maintained in relation to notes payable in specific articles, that after the time of payment has elapsed the obligation of the maker is not a mere duty to pay money, but a liability in damages for the non-fulfillment of his contract.§

In Tennessee, it has been decided that the measure of damages for breach of a covenant to pay a given sum in a particular species of paper, as Tennessee, Alabama, or Mississippi bank notes, is the specie value of such notes, according as it would be for the interest of the covenantor to discharge the obligation.¶ The court saying: "Manifestly, on the day the payment was to be made the covenantee might have discharged himself by the payment of one hundred dollars, in paper of either description described in the covenant; of course he might have selected the least valuable bank notes mentioned. If he failed to pay, and broke his covenant, what injury would the covenantor sustain thereby? Certainly, only the value in money of the article in which payment might have been made. As the measure of damages in covenant consists in the value

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\* Brooks *vs.* Hubbard, 8 Conn. R., 58

† Perry *vs.* Smith, 22 Verm. R., 301.

‡ Price *ads.* Instrobe, Harper's Reports, 111.

§ Wilson *vs.* George, 10 N. H. R., 445.

¶ Hixon *vs.* Hixon, 7 Humphreys, 88.

to the covenantee of the thing required to be performed at the time of the breach, the damages in this case must be the specie value of the notes in which payment might have been made, and in which it would have been most to the interest of the covenantor to have paid." I confess this seems to me the most correct view of contracts of this description.

In Mississippi, it has been held that if a note be given for depreciated bank paper, the measure of damages in an action on the note is the value of the money at the time the note was given, the burthen of the entire proof of the case, however, lying on the defendant. I cannot see, however, that this case can be defended on principle; nor as it appears to me, is it consistent to deny a party the right to speculate on the rise of a given species of paper, as he would have in regard to any article of merchandise.\*

We shall have occasion again to advert to this subject, when we come to treat of sales of chattels.

Having thus exhibited the rules in regard to promissory notes, which are the simplest form of legal obligation, we turn now to bills of exchange.

If the bill be properly an inland bill, and if there be no difference between the currency or rate of exchange at the time and place where the bill is drawn and the time and place where it is payable, then the measure of damages is the same as that we have laid down in regard to notes; but in regard to foreign bills of exchange generally, the question becomes more complicated by the introduction of the element of re-exchange.

The general rule is, that the holder of a bill protested for non-payment, is entitled to the amount of the bill, re-exchange, and charges.

"Re-exchange," says Mr. Chitty,† "is the expense incurred by the bill being dishonored in a foreign country in which it was payable, and returned to the country in which it was made or endorsed, and there taken up. The amount of it depends on the course of the exchange between the countries through which the bill has been negotiated. It is not necessary for the plaintiff to show that he has paid the re-exchange; it suffices if he were liable to pay it;

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\* Walker vs. Meek, 12 Smede. & M., 495.

† Bills, 666.

but if the jury find that there was not at the time any course of re-exchange between the two foreign places, then no re-exchange is recoverable.”\*

“By re-exchange,” says Mr. Justice Story, “is meant the amount for which a bill can be purchased in the country where the acceptance is made, drawn on the drawer or endorser, in the country where he resides, which will give the holder of the original bill a sum exactly equal to the amount of that bill at the time when it ought to be paid, or when he is able to draw the re-exchange bill, together with his necessary expenses and interest, for that is precisely the sum which the holder is entitled to receive, and which will indemnify him for its non-payment.”†

The question of re-exchange usually arises in regard to the drawers and endorsers; for the acceptor is not, upon non-payment of the bill, ordinarily liable to the holder for any thing more than the principal sum, and the expenses of the protest with interest.‡ But if he has expressly or impliedly agreed with the drawer, or with any endorser, for a valuable consideration, to pay the bill at its maturity, and has failed to do so, and the drawer or endorser has been compelled to take up the bill, and pay damages and other expenses necessarily incurred thereby, he may, perhaps, be compellable fully to indemnify the drawer or endorser for all the damage and expenses so paid by him, on account of the breach of his contract.§

The subject of re-exchange is very differently treated in England and in the United States. The rate which the holder is entitled to recover, depends in the former country on the actual course of exchange, as proved at the trial, while in this country, with that leaning to a fixed rule which we shall have occasion again to notice, when speaking of the subject of insurance, the amount of re-exchange is generally regulated by positive statutory provision.||

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\* See, also, *De Tastet vs. Baring*, 11 East, 265, where the origin and principle of the right to re-draw is gone into at large. *Mellish vs. Simeon*, 2 H. Black., 878, 879. *Pollard vs. Herries*, 3 B. & P., 885.

† Story on Bills, 400.

‡ *Bowen vs. Stoddard*, 10 Met., 875. *Newman vs. Goza*, 2 La. Ann. R., 642.

§ Story on Bills, § 898. Chitty on Bills, Part 2, Ch. VI., 666 to 669. *Woolsey vs. De Crawford*, 2 Camp., 445. *Napier vs. Schneider*, 12 East, 420. *Bayley on Bills*, Ch. IX., 353; *Riggs vs. Lindsay*, 7 Cranch., 500; *Bowen vs. Stoddard*, 10 Met., 875; *Pothier de Change*, 115, 117.

It has been decided in Pennsylvania, that the acceptor is not liable for re-exchange. *Watts vs. Riddle*, 8 Watts, 545.

|| Mr. Chitty, in his *Treatise on Bills*, 188 and 667, suggests the expediency of a

To obtain a correct appreciation of this branch of our law, it is necessary to consult those treatises which are specially devoted to it; and I shall therefore content myself here with a brief examination of a few of the cases which have been decided in this country, and a reference to the statutory provisions of the various States.

It should be borne in mind that these statutes have no extra territorial operation. So it has been held in Massachusetts, that the statute of Maine—which enacts that in an action on a bill of exchange drawn or endorsed in that State, but payable out of it, and protested for non-payment, the holder shall recover three per cent. damages in addition to the contents of the bill and interest—does not entitle the holder to recover those damages in a suit against the acceptor in the courts of Massachusetts.\*

The desire to establish a fixed rule in the matter of re-exchange, manifested itself in this country at an early period of our colonial history. In Pennsylvania, as far back as the year 1700, the legislature enacted, that if any person within that province, should draw or endorse any bill of exchange upon any person in England, or other parts of Europe, and the same should be returned unpaid, with a legal protest, the drawer and all concerned, should pay the contents of the bill with *twenty per cent. advance for the damage* thereof in the same specie as the bill was drawn, or current money of that province, equivalent to that which was first paid to the drawer or endorser.†

So in Massachusetts, the old rule, founded on usage (since modified by statute), was to allow on all foreign bills drawn on England, and probably also upon any part of Europe, ten per cent. as damages in lieu of re-exchange.‡

In New York, the original usage, was to allow twenty per cent. damages, in lieu of re-exchange, on all bills drawn on Eng-

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fixed rule analagous to those adopted by the States of our Union; and among certain parties connected with the trade between England and East India, the subject is regulated by a resolution of the East India Trade Committee, fixing all charges at 25 per cent. Chitty on Bills, 668.

\* Fiske vs. Foster, 10 Met., 597.

† See Francis vs. Rucker et al., Ambler, 672, and Hendricks vs. Franklin, 4 J. R., 118. In Rhode Island, as early as 1748, an act of similar purport was passed, fixing the damages at *ten per cent.* Brown vs. Van Braam, 8 Dallas, 244, 248.

‡ Grimshaw vs. Bender, 6 Mass., 157, 161, 162.

land or any part of Europe. In an action, brought in New York, on a bill drawn by the defendant on a Liverpool house, endorsed to the plaintiff, and protested for non-payment, the plaintiff claimed twenty per cent. damages, and interest, together with two per cent. for the difference of exchange, it being two per cent. above par when the defendant was notified of the non-payment of the bill. But the claim of the endorser was refused, notwithstanding reliance was placed on a usage of the Chamber of Commerce.

Spencer, J., said, "The right to recover damages on the protest of a foreign bill of exchange, rests with us on immemorial commercial usage, sanctioned by a long course of judicial decision. \* \* It is presumed that our rule to allow twenty per cent. on the protest of a foreign bill, was originally co-extensive with the rule established in Pennsylvania, and that the same reasons induced both rules. The twenty per cent. was in lieu of damages, in case of re-exchange, and because there was no course of exchange from London to New York, and to avoid the constant fluctuation and uncertainty of exchange." After saying that the usage of the Chamber of Commerce was too recent to alter the rule of law, he closed by stating, "In my opinion the twenty per cent. is in lieu of all claim for damages in such cases; and the claim for the difference in the price of the bills cannot be supported, and therefore it must be deducted in this case."\*

In a subsequent case, however, in the Court of Errors,† though the twenty per cent. was allowed, the rule in regard to the sum on which it was assessed was altered. The court decided that the holder of a bill of exchange, drawn here on England and protested there, was entitled to recover the contents of the bill at *the rate of exchange* on England *at the time of the return* of the dishonored bill and notice given to the drawer, and that the twenty per cent. damages and interest were to be calculated on this amount, as the principal sum, and not upon the fixed par of exchange. The judgment of the Supreme Court was reversed, but no reasons were assigned.‡

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\* *Martin vs. Franklin*, 4 J. R., 112.

† *Graves vs. Dash*, 12 J. R., 17.

‡ Mr. Chancellor Kent has stated the present rules existing in many of the American States, in 8 Kent's Com., Lec. XLIV., 116 to 121.

The American Jurist for July, 1829, Vol. II., 79, contains an interesting article on

We have thus far considered the subject of damages and re-exchange on bills protested for non-payment. The same general principles govern the case of bills protested for non-acceptance.

"On failure of the performance of the engagement that the drawer will accept," says Mr. Chitty,\* "the drawer of a bill will immediately, and before the time specified in the bill for payment, be liable to an action, not only for the principal sum, but also in certain cases for interest, re-exchange, and costs, as a consequence of the bill not being honored." This was decided as early as the year 1765,† and again by Lord Mansfield,‡ on the ground that what the drawer had undertaken has not been performed, the drawer not having given the credit which was the ground of the contract; and the same point was held in an action by the endorsee against the endorser,§ each endorser being considered as a new drawer. It had been decided in bankruptcy to the same effect at an earlier day;|| and the rule in this country is the same.¶

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the subject of Damages on Bills of Exchange. It states the difference between the system of reëxchange in force in Great Britain and France, and that of arbitrary damages adopted in the United States, and discusses various questions; whether the European or American system is the best; whether the want of a uniform law on the subject in the different States is an evil; and, if so, in what manner it should be redressed. An able report was made on the subject by Mr. Verplanck to the House of Representatives of the United States, in March, 1826, maintaining the right of Congress to control the subject, urging the importance of establishing a uniform rule, and strongly contending for the rule of actual reëxchange as opposed to that of arbitrary damages.

"In fact," says the report, "this principle is the only one which can perfectly and under all circumstances and fluctuations of exchange, secure any thing like a fair compensation of the loss sustained by the holder of a dishonored bill, without the hazard of one party being sometimes but partially paid, or the other oppressed with the payment of unequal and ruinous damages. \* \* If this principle be adopted, no valid reason appears why arbitrary damages should be added. If provision be made for the substantial fulfilment of the engagement of the seller of the bill, and if he acted in good faith, the requiring any additional sum as a mulct or penalty for the failure of some other person, is useless and unjust, and as recent examples in some of our cities have proved, may be of the most dangerous consequences, and overturn the credit of many a fair trader who had made the amplest arrangements to meet all his engagements."

\* Bills, 216.

† Bull. N. Prius; Bright *vs.* Purrier, 269.

‡ Milford *vs.* Mayor, Douglas, 54.

§ Ballingalla *vs.* Gloster, 8 East, 481.

|| Macarty *vs.* Barrow, 2 Strange, 949, of which a fuller report is given in Chilton *vs.* Whiffin, 8 Wilson, 17.

¶ Mason and Smedes *vs.* Franklin et al., 8 J. R., 202; and again in Weldon *vs.* Buck et al., 4 J. R., 144.

In New York, the damages in cases of protest for *non-acceptance*, are by statute fixed at the same rate as for non-payment. This was the rule before the statute.\*

When a bill is drawn in Alabama, payable at a place without its limits, neither interest nor damages can be recovered of the acceptor upon its dishonor without proving the law of the place of payment as to such damages and interest. But it is no objection that interest and damages for non-payment are included in the same entry of judgment without specifying the amount of each separately.†

Some points still remain to be noticed which have a common application to bills and notes. We shall have occasion hereafter to consider the principles which govern the allowance of interest in a separate place: it is sufficient to say here, that the general rule is, that though the law does not always imply a contract on the part of the debtor to pay interest on the sum he owes,‡ still, in the case of a bill or note, interest is usually recoverable from the time it becomes due; and a bill or note, payable at a certain day, carries interest from that day, unless the non-payment at the appointed time was occasioned by the negligence of the holder.§

In France the rule appears different. On the protest for non-acceptance, the obligation of the parties indebted, says Pardessus, *Cours de Droit Commercial*, Part II., Tit. IV., Ch. IV., Sect. 7, vol. 2, 424, is either to pay, to deposit the amount, or to give security. "Lorsque il (la personne poursuivie) donne une caution jugée suffisante, ou qu'il consigne, le porteur n'a plus jusqu'à l'échéance de droits à exercer ni contre lui ni contre les autres signataires de la lettre pour exiger qu'ils donnent un semblable cautionnement, ou qu'ils remboursent, parce que l'obligation des co-dbiteurs étant alternative de payer, ou de donner caution, l'un d'eux était libre de choisir le mode qui leur convenoit pour acquitter la dette de tous."

And there are traces of some similar or analogous custom in England. In *Bright vs. Purrier*, the defendant offered to prove a commercial usage not to pay till protest for *payment*; and in *Buller's Nisi Prius*, page 266, it is said: "When the bill is returned protested, the party that draws the bill is obliged to answer the money and damages, or to *give security to answer the same beyond sea*, within double the time the first bill ran for."

\* See Reviser's notes to the 22d Section, 1 R. S., 771. The point was expressly decided in *Weldon et al. vs. Buck et al.*, 4 J. R., 144; and the same is the rule in England.

† *Dickinson vs. Branch Bank of Mobile*, 12 Ala., 54.

‡ *Chitty on Bills*, Chap. VI., 662. *De Haviland vs. Bowerbank*, 2 Camp., 50; *De Bernales vs. Fuller*, 2 id., 426; *Walker vs. Constable*, 1 Bos. & Pull., 307.

§ *Robinson vs. Bland*, 2 Burr., 1077; *Lang vs. Stone*, 2 Man. & Ry., 16; *Bann vs. Dalzell*, Mood. & M. 228; *Greenleaf vs. Kellog*, 2 Mass. R., 568; *Cooley vs. Rose*, 3 Mass. R., 221; *Hastings vs. Wiswall*, 8 Mass., 455; *Foden vs. Sharp*, 4 J. R., 188; *Slacum vs. Pomery*, 6 Cranch, 221; *Cannon vs. Beggs*, 1 McCord, 371.



We shall have occasion hereafter to see that the English courts are less disposed to allow interest than those of this country; and in accordance with this disposition, it appears that there, when interest is not made payable by the bill itself, the jury are not bound to give it, but it rests in their discretion to award it, if they are of opinion that the delay of payment has not been occasioned by the fault of the holder. And so in a late case they refused it where a promissory note had been overdue thirty years; and the court, on motion, would not increase the verdict by giving it.\*

A party who guaranties the due payment of a bill of exchange by the acceptor, is liable for interest upon it if it be not paid when due.†

Some other decisions have been made upon the subject of the amount of recovery, which it may be proper to notice. An endorser who is sued on his endorsement, and subjected to costs, cannot recover those costs against the maker. He can only have the amount of the note and interest;‡ “because,” says the Supreme Court of New York, “if the endorser of a note be duly fixed, he ought to pay it without waiting to be sued; and if he finds it more convenient to delay taking up the note until he is prosecuted to judgment and execution, the drawer ought not to pay for that convenience. \* \* The mere fact of drawing the note does not imply a promise to save the payee harmless from all costs and charges that he may be subjected to as endorser. There must be a special promise to save harmless before the payee can call upon the drawer for costs accrued by the default of the payee (endorser) himself.” In a suit against the endorser the fees of protest are a proper charge.§ And an endorser who has paid the note, can, it seems, recover the costs of protest against the maker.||

On the same principle it has been held in England,

\* *Du Belloix vs. Lord Waterpark*, 1 Dow. & Ry., 16; *Bann vs. Dalzell*, Mood. & M., 228; *Arnott vs. Redfern*, 3 Bing., 858; *Calton vs. Bragg*, 15 East, 228; 3 Bing., 559; *Higgins vs. Sargent*, 2 Barn. & Cres., 341; *Page vs. Newman*, 9 Barn. & Cres., 378; 6 Bing., 380. See, also, Chitty on Bills, ch. vi., 662, et seq., and many cases therein cited, and Starkie on Evidence, Tit. Bills of Exchange, Damages.

† *Ackerman vs. Ehrensperger*, 16 M. & Wels., 99.

‡ *Sampson vs. Griffin*, 9 J. R., 181. See, also, *Steele vs. Sawyer*, 7 McCord, 459, and *Richardson vs. Parnell*, 1 McCord, 192, to the same point as *Sampson vs. Griffin*.

§ *Merritt vs. Benton*, 10 Wend., 116.

|| *Morgan vs. Reintzel*, 7 Cranch, 273.



where an accommodation acceptor was sued by a *bond fide* holder, that as he ought to have paid it when demanded he could not recover the costs against the party who had improperly endorsed it to the holder.\* So also, the acceptor of a bill with funds who has failed to pay, is not liable for the costs of a suit against the drawer.† And the endorser of a bill is not liable for the costs of a suit by the holder against the acceptor, nor for commissions paid on the collection of the money.‡ In like manner the endorser of a regular bill who has been sued by an endorsee, is not entitled to recover from the acceptor his costs in such action.§ But a party who makes or endorses or accepts an accommodation bill or note is regarded as a surety, and can charge the party for whose benefit his signature is given, with the costs of a suit for the collection of such a note or bill if he be compelled to pay it. So the accommodation acceptor of a bill who is sued, can recover his costs of the drawer.||

And so it has been held between the accommodation endorser of a note and the maker.¶

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\* *Bleaden vs. Charles*, 7 Bing., 618. See this case commented on in *Asprey vs. Levy*, 16 M. & W., 851. *Roach vs. Thompson*, 1 M. & M., 487.

† *Barnwell vs. Mitchell*, 3 Conn., 101.

‡ *Bangor Bank vs. Hook*, 5 Greenleaf, 174.

§ *Dawson vs. Morgan*, 9 B. & C., 618.

|| *Jones vs. Brooke*, 4 Taunt., 764.

¶ *Hubbly vs. Brown*, 16 J. R., 70. *Baker vs. Martin Adm'x*, 3 Barb. S. C. R., 634; and see, post, of Principal and Surety.

## CHAPTER IX.

### THE MEASURE OF DAMAGES IN ACTIONS UPON POLICIES OF INSURANCE.

**Marine Insurance—partial loss—total loss—general average—the principle of arbitrary remuneration—Fire Insurance.**

THE contract of insurance is one of indemnity ; in other words, the insurer undertakes to make good to the insured the damage which, under certain circumstances, he may sustain. This subject, therefore, forms a necessary part of a treatise on the law of damages, while at the same time, as it has, like the matter of the last chapter, been fully treated of in the separate works devoted to this particular branch of jurisprudence, it would be improper here to do more than give a general outline of the subject.

Marine insurance is defined to be a “ contract of indemnity in which the insurer, in consideration of the payment of a certain premium, agrees to make good to the assured all losses, not exceeding a certain amount, that may happen to the subject insured from the risks enumerated or implied in the policy, during a certain voyage or period of time.”\*

In England this contract retains more nearly its original and proper character as a contract of indemnity measured by the actual loss ; but in the United States it has been very materially modified by the introduction of various arbitrary rules ; among which the most prominent are the deduction of “ one third new for old,”† the doctrine of abandonment for constructive total loss, and the principles adopted in the settlement of general averages. There is no branch of the law in which the rule of

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\* Duer on Marine Insurance, vol. i., 58.

† This is, however, common to the English system.

compensation has been made so much to yield to that arbitrary remuneration, if it may be so called, in other words, the principle analogous to that of the *Lex Aquilia* of the Roman law, by which, instead of an inquiry into the exact circumstances of the particular case, a fixed rate or proportion is determined, by which the recovery in all instances is governed.

The losses for which the insurer becomes liable fall under one of these three heads :

Partial Loss ;  
Total loss ; or  
General Average.

*Partial loss* is, as its name implies, a partial destruction of the thing insured.

A *Total loss* occurs where the thing insured is physically destroyed or rendered valueless ; or where, under the doctrine of constructive losses, the deterioration is so great as to authorize the insurer to abandon and demand payment as for an actual physical total loss.

*General average*, or contribution in general average, is that sum which on any sacrifice of a part of the interests at risk for the joint benefit of all, becomes due from the other parties to the adventure to make up for the sacrifice.

With these broad lines of division in view, it will not be difficult to understand to what extent the contract of insurance is one of indemnity, and how far it has departed from its original signification ; but we should first notice the exceptions in the contract itself.

The American policies on vessels generally contain a declaration, that "no partial loss, or particular average, shall in any case be paid unless amounting to five per cent.," or some similar clause ; and the cargo policies have an analogous provision,\* defining the extent of the underwriters liability. By

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\* The following is the clause referred to in the text as it exists in the New York policies : MEMORANDUM.—It is agreed, that bar, bundle, rod, hoop and sheet iron, wire of all kinds, tin plates, steel, madder, sumac, wickerware, and willow, manufactured or otherwise, salt, grain of all kinds, tobacco, indian meal, fruits (whether preserved or otherwise), cheese, dry fish, vegetables and roots, rags, hempen yarn, bags, cotton bagging, and other articles used for bags or bagging, pleasure carriages, household furniture, skins and hides, musical instruments, looking-glasses, and all other articles that are perishable in their own nature, are warranted by the assured free from average, unless general ; hemp, tobacco stems, matting, and cassia, except in boxes, free from

these clauses it will be seen that in a large class of cases, no partial loss whatever is to be paid, and in others, none unless amounting to a certain portion of the whole value insured. In the former case, to found a claim for recovery, the subject at risk must be totally lost. And as to what constitutes a total loss, many very interesting cases have been decided. But this inquiry is foreign to our present subject. It is only necessary to observe, that unless the injury comes up to the limit fixed by the policy, the insured can claim no damages; he can have no remuneration or compensation for any loss less than that required by the contract.

In regard to partial losses, the allowance of *one-third new for old* is the most important arbitrary limitation of the amount of relief which usage has engrafted on the policy.

In case of a partial loss on the ship, the underwriters are nominally liable on the face of their contract to pay for the actual damage sustained. But it is considered, that where old timbers or other materials are replaced by new, the vessel, when repaired, is better than she was before the damage was sustained. And accordingly, it is held, that the assured must himself bear a part of the expence of the repairs.\* Says Mr. J. Story,† “If the difference between the value of the vessel before the damage and after the repairs, were to be ascertained in each particular case by actual inspection, there would be no end of controversies; and therefore general usage, which the law follows as founded on public convenience, has applied a certain rule to all cases.” This rule is, “that the assured shall pay one third part of the expence of labor and materials necessary to make the repairs, and shall recover only two-thirds of the underwriters, it being considered that in general the ship is better by the amount of one third of the expense of the

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*average under twenty per cent., unless general; and sugar, flax, flax-seed, and bread, are warranted by the assured free from average under seven per cent., unless general; and coffee in bags or bulk, pepper in bags or bulk, and rice, free from average under ten per cent., unless general.*

No damage to be allowed for goods injured by spotting, unless caused by the immediate contact of sea-water with the articles damaged. In case of partial loss by sea damage to dry goods, cutlery, or other hardware, the loss shall be ascertained by a separation and sale of the portion only of the contents of the packages so damaged, and not otherwise; and the same practice shall obtain as to all other merchandise, as far as practicable.

\* Phillips on Insurance, vol. ii., 197.

† Peele vs. Merchants' Ins. Co., 8 Mason, 27.

repairs. This allowance is called the deduction of *one-third new for old*.\*

The Supreme Court of Massachusetts, speaking of this rule, have said, "That it is arbitrary and operates in some cases unjustly, giving to the insured more or less than a full indemnity, to which only he is entitled by the policy. The rule originated from the usages among merchants and underwriters, probably from the great difficulty of ascertaining the actual loss without first repairing the damage done or estimating the cost of repairs."†

We have already had occasion to notice‡ that though the plaintiff's loss has been made good by charitable contributions, his claim for legal relief is not thereby prejudiced; and there are other cases where he has been allowed remuneration beyond his positive loss. So, it is no defence to an action for a partial loss on a policy of marine insurance, that the expence of the repairs for the amount of which the loss is claimed was covered by a loan made by the correspondent of the owner on a bottomry of the vessel, and that the bottomry loan was realised by such correspondent, after the subsequent total loss of the vessel, out of an insurance effected by him on his bottomry interest, and no part of the loan was ever paid by the owner.§

In case of total loss, it has been settled that the assured can abandon to the underwriters, and claim payment of the sum insured. This doctrine was not introduced into the law of insurance until long after the contract was familiarly known to commerce, and is very differently applied in different commercial countries. In the United States, whenever upon a disaster taking place, the thing assured, after making the deduction of one-third new for old, is found to be damaged more than half its value, the assured can abandon to the underwriters and claim a total loss. In other words, instead of being entitled to a compensation for the actual damages sustained, he may recover the whole value of his interest at risk. This rule in a modified form prevails in France, and generally on the continent; but the English law firmly maintains the more salutary doctrine that

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\* Phillips on Insurance, vol. ii., 197.

† Brinley *vs.* National Ins. Co., 11 Met., 195.

‡ Supra, 89.

§ Read *vs.* Mutual Safety Ins. Co., 8 Sandford, S. C. R., 54.

no abandonment can be sustained unless the thing assured is injured to its full value.

In the United States, the same principle of arbitrary remuneration is applied to claims made on the underwriters in the nature of general average, or wherever a sacrifice is made for the common benefit. The interests generally in jeopardy in these cases are the vessel, freight, and cargo; and when the sacrifice is to be made good in general average, the values of these subjects are to be arrived at as forming the basis of computation. It seems to be well settled in this country that the value of the cargo is to be arrived at by taking the invoice prices, instead of instituting any inquiry into the market value; and this also applies to cases of partial or total loss.\* The vessel and freight are of more fluctuating and uncertain value. The actual worth of the vessel diminishes during the voyage with each day's wear and tear; and the value of the freight is also diminishing by reason of the wages, provisions, and expences, which are in a constant state of disbursement to earn it. In New York, to arrive at the value of the vessel, one-fifth of its value at the time of sailing is deducted; and the freight contributes on one-half, and is contributed for on the whole.† And this principle of arbitrary valuation, though the rate or proportion may differ, prevails, we believe, universally throughout the United States.‡

It may be proper to add, that this arbitrary remuneration has been greatly extended by the general adoption in this country of the practice of valuation. It has become habitual to value the thing assured in the policy; and these valuations fix the basis of recovery, and forbid inquiry into the actual damage sustained, unless the over-estimate is so great as to induce a belief of fraud.

We have already had occasion to notice the exceptions to

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\* *Le Roy vs. United Ins. Co.*, 7 J. R., 848.

† This was the rule laid down in the case of *Leavenworth vs. Delafield*, 1 Caines, 578, and has been acted on ever since. The principle has been recently somewhat shaken by Judge Betts in the District Court of the United States; *The Mutual Safety Ins. Co. vs. The George*, vol. 8 Law Reporter, 861, to which here, however, it is only necessary to call attention thus briefly.

‡ So in Massachusetts, it is held that the contributory value of freight in general average, is to be ascertained by a deduction of one-third of the gross freight. *Humphreys vs. Union Ins. Co.*, 3 Mason, 420.

the rule, that legal compensation is only given for actual injury, which have been introduced into this branch of the law.\* It is only necessary here to remind the reader of their existence.

When we turn to the subject of fire insurance, we find that the policy retains much more nearly its original character as a contract of indemnity. In this branch of the great business of insurance, the practice of valuation is unknown; the doctrine of abandonment has never been introduced; and the right to recover depends, in all cases, on the actual loss sustained, to be proved in the particular instance.†

In Ireland, the general rule in cases of fire insurance has been thus laid down in a case where a mill and machinery were injured by fire. The court directed the jury to say, "what state of repairs the machinery was in, what it would cost to replace it by new machinery, and how much better, if at all, the mill in which the machinery was placed would be with the new machinery than it was at the time of the fire, the difference to be deducted from the entire expense of placing there such new machinery."‡

This rule has been adopted in this country, in cases where the property is injured and repaired so as to replace it substantially as it was before the accident.§ But in cases of total destruction, much confusion appears to exist.

Mr. Greenleaf has said,|| that the actual loss is to be ascertained by the expense of restoring the property without any deduction for the difference of value between the old and new materials; and on the other hand an effort was recently made in Massachusetts, in a suit on a fire policy to introduce the analogies of marine insurance; the defendants insisting on deducting from the estimated cost of a new building, the difference in value between the old and such new building. The property had been totally destroyed, and a different building had been erected on the premises. In this case both these rules were re-

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\* *Supra*, 230.

† An interesting discussion of some important points on the measure of damages in cases of insurance against fire, will be found in the opinion of the learned Chief Justice of the Superior Court of New York, in *Laurent vs. The Chatham Fire Insurance Co.*, 1 Hall, 41.

‡ *Vance vs. Foster*, 1 Irish Circuit Cases, 51. § Stephens' N. P., 2084.

§ *Brinley vs. The National Insurance Co.*, 11 Met., 195.

|| 2 Greenleaf on Ev., § 407.

jected ; the court saying as to the latter, with great justice, that it was not supported by any authority or principle. They also refused to sanction the principle laid down by Mr. Greenleaf, saying, that if it were followed the assured in some cases would recover more than an indemnity, and much more when the building is dilapidated and out of repairs ; that the underwriters are liable only to pay a fair indemnity for the loss ; and that, whatever the rule might be when the building insured is partially injured by the peril assured against, it has no application to cases like the present, where the building is totally destroyed and to be replaced by a new one ; and they proceeded to say, "If the rule laid down in *Vance vs. Foster*, were applied, the jury must ascertain by the estimates and opinions of witnesses, the amount of the expences of a new building, and they must estimate the value of the old building in order to ascertain the difference, if any there be, between the new and old. We can perceive no use in requiring this double estimate ; for when the plaintiff is only entitled to recover the amount of the value of the building destroyed, the estimate of the cost of a new building is useless. We are, therefore, of opinion that there is no rule of damages applicable to the present case, and that in all cases where no rule of damages is established by law the jury are to decide upon the question, and that to their decision there can be no legal exception." And a new trial was ordered.\*

I see no ground on which this decision can be maintained. To say that a contract of insurance is a contract of indemnity, and at the same time that there is no rule of damages whatever, and that the jury are to dispose of the matter absolutely, seem very contradictory propositions. Nothing can be more dangerous in cases of insurance above all others, than to leave the matter to the uncontrolled arbitrament of the jury-box. It is well known that owing to the defendants in insurance cases being in this country always corporate bodies, there exists an extreme laxity in the verdicts rendered, and a very great disposition to stretch the justice of the case, so as to save individuals from loss. What then more perilous than to leave an issue of this kind to the absolute disposition of the jury ? And the decision appears the more remarkable be-

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\* *Brinley vs. The National Ins. Co.*, 11 Met., 195.



cause the case of *Vance vs. Foster*, offers a clear and simple mode of arriving at the desired result with accuracy and safety. The court say, "We perceive *no use* in the double estimate." The utility of it is two-fold. In the first place, to secure the great object of not leaving the matter to the loose and unguarded decision of the jury; and in the second place, because, no practical man, whether mason or builder or juryman, has any means of arriving at the value of an old or second hand building, save by this very double estimate. He first calculates what it would cost to put up such a building originally, and then how much it has been deteriorated. And it is only by this two-fold process that justice can be arrived at. It is a legal solecism to call the contract of insurance a contract of indemnity, if verdicts upon policies are to be governed by the uncontrolled discretion of the jury. This reasoning would not be admitted even in a common case of trespass free from malice. If a building was destroyed by ordinary negligence, would a jury ever be told that without being governed by any estimate of its value, they are the sole masters of the subject? Nothing is more important than to reduce this branch of our law to system; and nothing short of extraordinary difficulty in laying down a rule, difficulty vastly greater than any existing in cases like this, should warrant a court to shuffle off the matter on the jury. The tribunals of Massachusetts have long been so eminent for their learning and sagacity, that it is with unaffected deference that any writer should venture to differ from them. Still I cannot persuade myself to refrain from this criticism.

For a more complete understanding of this branch of our subject, the reader is referred to the various treatises devoted to this particular branch of the law. But I cannot quit it without expressing the opinion that the principle of arbitrary remuneration has been carried, in this country, to a very dangerous extent. It certainly removes difficulties, lessens the labor of all parties concerned in the inquiry, and may perhaps be said, on the whole, to do justice: but on the other hand, it is the business of the law and her officers not to shun but to grapple with difficulties; it hardly becomes the dignity of jurisprudence to declare its inability to do right in the particular instance; a rough average of justice is far from satisfactory to the suitor who suffers gross hardship in the individual

case, and as applied to the subject of technical or constructive total loss, the fixed rule holds out infinite temptations to fraud and litigation.\*

It has already been stated that nice questions often present themselves, as to the amount and character of evidence necessary to prove damage; and in no branch of the law are they more perplexing than in insurance cases. We shall have occasion to recur to the subject when treating of evidence. I shall at present content myself with referring to the judicious language of Mr. Justice Story.†

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\* It is superfluous to name the leading English and French authors on the subject of this chapter, or Mr. Phillips's work, which is equally well known; but I can, with propriety, mention the learned treatise with which Mr. Duer, of New York, is now enriching our libraries; and I may also be allowed to state the pleasure and benefit that I have received from the very able work of M. ALAUZET.—*Traité Général des Assurances*.

† Rogers *vs.* Mechanics' Ins. Co., 1 Story, 608.

## CHAPTER X.

### MEASURE OF DAMAGES UPON THE BREACH OF CONTRACTS FOR THE SALE OF PERSONAL PROPERTY.

**Roman Law**—General rule as against vendor is the difference between the contract price and the value of the article on the day fixed for delivery—How far this rule is modified by payment of the price in advance—Examination of the decisions—As against vendee, the whole price may be recovered, although the article be not delivered—Rules of the modern Civil Law—Molinaeus—Pothier—Measure of damages against vendor upon breach of warranty, is the difference between the value of the article as warranted, and its value as delivered.

WE now approach the consideration of a large class of cases falling under the head of the common law action of assumpsit—that of contracts for the sale of chattels or personal property. These contracts may be broken either completely, by the vendor's neglect to deliver the article, or by the vendee refusing to pay the price; or partially, by the article proving different from some warranty made in regard to it at the time of sale. Generally it may be said that these agreements furnish their own measure of damages; in other words, that courts of justice, without desiring to fix any arbitrary rate of remuneration, endeavor solely to carry into effect the contract of the parties; and to this rule the only exception that can be said to exist, is that in regard to agreements of an unconscionable and oppressive character, which we have already considered.\*

The general language of the Roman law is, that in case of the breach of contract of sale by non-delivery, the measure of damages is all that the buyer loses or fails to gain in relation to the thing itself, over and above the price paid; *id quod interest propter rem ipsam non habitam*. And, embarrassed by no form of action, the civil law inquires in each case into the motives

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\* Supra, 215, et seq.

of the defendant, and apportions the damages according to his delay, fault or fraud.

The language of the digest on the subject of damages for non-delivery is as follows: "*Si res vendita non tradatur, in id quod interest agitur; hoc est quod rem habere interest emptoris.*"\* And so says the Code, "*Sit traditio rei venditae, juxta emptoris contractum, procacia venditoris non fiat, quanti interesse compleri emptionem fuerit arbitratus praeses provinciae tantum in condemnationis taxationem deducere curabit.*† *Hoc autem pretium egreditur. Si pluris interest quam res valet vel empti est.*"‡ And so, again, "*Quum per venditorem steterit quominus rem tradat, omnis utilitas emptoris in aestimationem venit quae modo circa ipsam rem consistit. Neque enim si potuit ex vino (puta) negotiari et lucrum facere, id aestimandum est non magis quam si triticum emerit et ob eam rem quod non sit traditum familia ejus fame laboraverit. Nam pretium tritici non servatorum fame necatorum consequitur. Nec major fit obligatio quod tardius agitur, quamvis aestimatio crescat si vinum hodie pluris sit: ne exito; quia sive datum esset, haberet emptor sive non: quoniam saltem hodie dandum est quod jam olim dare oportuit.*§

The form of action prescribed against the seller of any merchantable commodity, who was in default for not delivering, was the *Condictio triticiaria*;|| and when treating of this subject, the digest says: "*Si merx aliqua, quae certo die dari debebat, petita sit; veluti vinum, oleum, frumentum, tanti litem esti-*

\* Dig., Lib. XIX., Tit. 1, de Actionibus Empti et Venditi.

† Cod., Lib. IV., Tit. 49, de Actionibus Empti et Venditi.

‡ Dig., Lib. XIX., Tit. 1, de Act. Em. et Vend.

§ Dig., Lib. XIX., Tit. 1, § 21, 8. See, also, Pandectes par Pothier, vol. 7, 120.

|| *Condictio triticiaria a tritico, tanquam nobilissimo mercium genere, vel a primis edicti verbis dicta, est actio personalis arbitraria ad rem quamlibet, praeter pecuniam numeratam spectans, et ex quacunque causa debitam, vel etiam nostram, ex causis, quibus condici potest, veluti ex causa furtiva vel re mobili vi abrepta.* Vicat; Vocabularium Utriusque Juris, in voc. Conf. Hevelke, Juristisches Wörterbuch.

The original Roman proceeding, *per conductionem*, one of the earliest of their curious and complex forms of action, and the true character of which had become dubious even in the time of Gaius, took its name from the act peculiar to it, viz., the *condictio*, or notice given by the plaintiff to the defendant, to be present on the thirtieth day to select a judge, *ut ad judicem capiendum, die tricesimo adesset.* Das Römische Privatrecht, von Wilhelm Reim, Book 5. The *condictio* of the Digest, in the time of Justinian was a more modern form. It seems to have been analogous to our action of Debt, in that it demanded some certain thing, or a sum certain of money, the price of it.

*mandum, Cassius ait, quanti fuisset eo die quo dari debuit; si de die nihil convenit, quanti tunc judicium acciperetur.*"\*

But these and other texts of the Justinian law on this subject, as on many treated of in that wonderful repository of acute and profound, but loose and ill-arranged decisions, are contradictory and perplexing. And their general terms throw little light on the complex relations of modern commerce.

We have first to consider the cases arising from the failure of the seller to perform his agreement.

When contracts for the sale of chattels are broken by the vendor failing to deliver the property according to the terms of the bargain, it seems to be well settled, as a general rule, both in England and the United States, that the measure of damages is the difference between the contract price and the market value of the article at the time when it should be delivered, upon the ground that this is the plaintiff's real loss, and that with this sum he can go into the market and supply himself with the same article from another vendor.† It follows from this rule, that, if at the time fixed for the delivery, the article has not risen in value, the vendee having lost nothing can recover nothing. And it will also be observed that in laying down this rule, the analogies of real estate are departed from, and that the price paid, or the consideration money is not considered conclusive, but that the actual value is inquired into.

A doubt may arise as to what is the time stipulated for delivery. Where oats were to be delivered "on or about" a certain day, it was held that the plaintiff was not limited to the difference between the contract price and the market value on the precise day named, but might recover the difference between the contract price and the market value within a reasonable time after that day.‡

But a different case is presented where the purchaser has paid the price in advance, or has otherwise, as by the transfer of stocks, been deprived of the use of his property; and here it has been insisted that the purchaser is not to be limited to the

\* Dig., De Con. Trit., Lib. XIII., tit. 8, § 4.

† Dey *vs.* Dox, 9 Wend., 129. Davis *vs.* Shields, 24 Wend., 322. Beals *vs.* Terry, 2 Sandf. S. C., 127.

‡ Kipp *vs.* Wiles, 3 Sandf. S. C. R., 585.

value of the article at the time of delivery, but shall have the advantage of any rise in the market value of the article which may have taken place up to the time of the trial; and on this point, different and conflicting decisions have been made. In England and in New York the latter rule is laid down, upon the ground that the purchaser, having been deprived of the use of his property, is entitled to the best price he could have obtained for the article up to the time of the settlement of the question.

A review of the decisions will best illustrate this rule. In an early case\* the defendant had agreed, in consideration of the receipt of £262 10s., to convey five shares of the Welsh copper mines, as soon as the books should be opened: this was done on the 22d of August, but the defendant refused to deliver. The value of the stock was then £175; and this sum was held to be the measure of damages; for, said Lord Mansfield, though the defendant received from the plaintiff £262 10s., yet the difference money only of £175 was retained by him against conscience, and therefore the plaintiff *ex equo et bono* ought to recover no more; if the five shares had been of more value, yet the plaintiff could only have recovered the £262 10s. *in this form of action, viz., for money had and received.*

It is to be noticed of this case, as was well observed by Mr. Justice Sutherland, in the Supreme Court of New York,† that it decides nothing as to the rule of damages where the action is not for money had and received, but is brought upon the contract itself.

In a later case in the King's Bench,‡ a writ of inquiry was issued to assess damages on a bond given by the defendant, conditioned to replace, on the 1st of August, 1799, a quantity of stock lent him by the testator. The only question was whether the damages should be calculated at the price of the stock on the 1st of August, or at the price on the day of trial, and the latter sum was held the true rule of damages. Grose, J., said, "The true measure of damages, in all these cases, is that which will completely indemnify the plaintiff for the breach

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\* *Dutch vs. Warren*, 2 Burr., 1010; also, but not so clearly reported, 1 Str., 406, cited by Lord Mansfield in delivering his judgment in *Moses vs. Macferlan*, 2 Burr., 1005.

† *Clark vs. Pinney*, 7 Cowen, 681 and 689.

‡ *Shepherd, Ex'or, &c. vs. Johnson*, 2 East, 211.

of the engagement." And Lawrence, J., said, "Suppose a bill were filed in equity, for a specific performance of an agreement to replace stock on a given day, which had not been done at the time, would not a court of equity compel the party to replace it at the then price of stock if the market had risen in the mean time?"

In a still more recent case,\* of a bond to re-transfer stock, the same principle was laid down. It was contended for the plaintiff, that he was entitled, at his option, to the best of three prices, either the value of the stock, on the day fixed for the transfer; or, secondly, the price at the day of trial; or, thirdly, the highest price which the stock had borne between the day of delivery and the day of trial. But the court held, on the particular circumstances of the case, that the third claim could not be sustained. It seems difficult, however, in reason, to say why, if the plaintiff is entitled to a subsequent rise, provided it maintain itself to the day of trial, he should be prejudiced by a fall that may be due only to the delays of litigation.†

Where an action was brought‡ to recover damages for the breach of a contract, by which the defendant had engaged to furnish the plaintiff a certain quantity of tallow in *all December*, at 65s. per cwt., the defendant had apprised the plaintiff, on the 1st of October, that he could not execute the contract, and he insisted that the difference between the contract price (65s.) and that of the first of October (71s.) was the rule of damages, on the ground that the plaintiff could as soon as apprised

\* *McArthur vs. Seaforth*, 2 Taunt., 257.

† Two later decisions in the English books hold substantially the same doctrine. In an action on a bond conditioned to replace stock at a particular day, the defendant not having replaced it, Lord Ellenborough held at *nisi prius*, that the plaintiff was entitled to claim according to the value upon the day of the trial. *Downes vs. Back*, 1 Starkie, 254. In an action on a bond to replace stock, Best, C. J., at *nisi prius*, held that the price of the stock should be taken as at the time of the trial, saying, "When the defendant had the money, he promised to restore the stock. Justice is not done if he does not place the plaintiff in the same situation in which he would have been if the stock had been replaced at the stipulated time. We cannot act on the possibility of the plaintiff's not keeping it there. All we can say is, that the defendant has effectually prevented him from doing so." *Harrison vs. Harrison*, 1 Car. & P., 412.

In a recent case of detinue for railway shares, the plaintiff demanded the shares on the 17th May, 1845, when they were worth £8 5s. per share, and they were not delivered till the 25th Nov. of the same year, when they had fallen to £1. The measure of damages was held to be the difference between these two sums. *Williams vs. Archer*, 5 Man. Gr. & Scott, 818. *Archer vs. Williams*, 2 Car. & Kir., 25.

‡ *Leigh vs. Patterson*, 8 Taunt., 540; 2 Moore, 588, S. C.



that the contract would not be executed, have gone into the market and supplied himself at the then rates. The plaintiff, however, insisted that he was entitled to the difference between the contract price (65s.) and the price on the 31st December (81s.), that being the last day for the performance of the contract; and of that opinion was the court. Park, J., said: "For any thing that appears, the plaintiff never assented to rescind the contract, and the defendant might have delivered the tallow at any moment up to the 31st of December; and the price on that day should have regulated the verdict of the jury."

The principle of this case was also applied in a recent decision,\* in which the distinction between contracts altogether executory and those where payment has been made, is clearly taken. Assumpsit was brought for the non-performance of contracts for the sale and delivery of 50 bales of bacon, to be shipped from Waterford in 1823. On the assessment of the writ of inquiry, the jury were told that they were at liberty to calculate the damages according to the price of bacon on the day when the inquiry was executed, and that the difference between that and the contract price ought to be the measure of damages. On a rule *nisi* to set this inquisition aside, upon the ground that the plaintiff was only entitled to recover the difference between the contract price and the price on the day when the bacon was to be delivered, the court said that the cases of *Shepherd vs. Johnson* and *McArthur vs. Seaforth* did not apply. "*In the case of a loan of stock, the borrower holds in his hands the money of the lender, and thereby prevents him from using it altogether.* Here the plaintiff had his money in his possession, and he might have purchased other bacon of the like quality the very day after the contract was broken; and if he sustained any loss by neglecting to do so, it is his own fault. We think the under sheriff should have told the jury that the damages should be calculated according to the price of the bacon at or about the day when the goods ought to have been delivered;" and the rule was made absolute.

So in an action for the non-delivery of railway shares on a given day, pursuant to contract, the property not having been paid for, the measure of damages is the difference between the

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\* *Gainsford vs. Carroll*, 2 B. & Cres., 624.



contract price and the market price on the day when the contract was broken.\*

So the vendee of shares in a projected railway, under a contract to be completed at a future day, may recover as damages for the non-delivery the difference between the price agreed on and the market price on the day on which the defendant refused to complete the sale, and that only. He is not entitled to damages in respect to an advance of price taking place afterwards at the time of the actual issue of the scrip. In other words, the time when the defendant refused to comply with his contract, is the determining point.†

The principle of the English cases has been followed in New York. In a case in that State,‡ assumpsit was brought by a pawnor against a pawnee who had sold the pledge (a note) before application to redeem, and it was held that the plaintiffs were entitled to recover the value of the note at the time of the application, and not at the time of the pledge.

In the same State,§ suit was brought on a contract to deliver salt which had been paid for, and the court held that the measure of damages was the highest price between the time fixed by the contract, and the time of trial.

In a late case in the same State,|| the subject was very fully discussed, and the distinction, accompanied however, by some proper qualifications, clearly declared. It was an action of assumpsit on a note, promising, for value received, to pay one hundred and fifty dollars in good salt, at one dollar and a half per barrel, to be delivered on the 15th of April then next. This the court held to be a contract to deliver salt, and decided, that as the goods had been paid for, the measure of damages was the difference between the contract price and the highest value at any time between the period for delivery and the day of trial; and Sutherland, J., said,

“We hold it, therefore, to be settled by authority, and rightly settled upon principle, that where a contract is made for the sale and delivery of goods or chattels, and the price or consideration is paid in advance, and an action is

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\* Shaw *vs.* Holland, 15 M. & Wels., 136.

† Tempest *vs.* Kilmer, 8 Man. Gr. & Scott, 249.

‡ Cortelyou *vs.* Lansing, 2 Caines' Cas. in Error, 200.

§ West *vs.* Wentworth, 8 Cowen, 82.

|| Clark *vs.* Pinney, 7 Cowen, 681.

brought upon the contract for the non-delivery, the plaintiff is not confined in measuring his damages, to the value of the articles on the day when they should have been delivered. But we doubt the propriety of giving the vendee, *in all cases*, as a measure of damages, the highest price of the article, between the day when it should have been delivered and the day of trial; *if he immediately, or without any unreasonable delay, commence and prosecute his action*, we think it just and proper that the fluctuations in price should be exclusively at the hazard of the defendant, the plaintiff having done every thing in his power to have the contract settled and adjusted, and which is prevented solely by the laches or default of the defendant. In such a case, therefore, the plaintiff is entitled to the highest price between the day when the delivery should have been made, and the day of the trial. But where he delays the prosecution of his claim beyond the period which may be considered reasonable for the purpose of endeavoring to make an amicable arrangement, he must be considered as assenting to the delay, and ought to participate in the hazard of it. In such a case we are inclined to think the rule of damages should be the value of the article at the commencement of the suit.

"Whether this rule of damages would be applicable to contracts for the sale and delivery of individual articles, purchased for the use and accommodation of the vendee, and not for the purpose of sale, we express no opinion. The case at bar is evidently a contract for the purpose of trade and commerce, and to that class of cases we wish to be understood as at present confining our opinion.

"The consideration in this case is acknowledged to have been received at the time of making the contract. Whether it was in money or in any thing else, is not, perhaps, material; but the presumption of law is, that it was in money."

It will be seen here that an expeditious prosecution of the demand is insisted upon as indispensable to a successful claim for the highest price prior to the verdict; and this must certainly be so, for it would never be tolerated that the plaintiff should derive benefit from delays of litigation caused by himself.

In a still later case,\* the principle "that where the vendor is in default for not delivering goods or chattels in pursuance of the contract of sale, *and no money has been advanced by the vendee*, the true measure of damages is the difference between the contract price and the value at the time the article should have been delivered," was affirmed; and again, it has been since held† "that the rule of damages on breach of an agreement to sell goods, is the market price on the day appointed

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\* Dey vs. Dox, 9 Wend., 129.

† Davis vs. Shields, 24 Wend., 322. Beals vs. Terry, 2 Sandf. S. C., 127, S. P.

for the delivery, less the contract price *where the latter is not paid.*"\*

But the authority of these cases has been much shaken by a recent adjudication in the same State. In an action of replevin against the sheriff for certain barrels of flour levied on by him, the plaintiff failed to prove his title; and the defendant on the trial elected to waive a return, and to take judgment for the value of the property. The value at the time of the sheriffs' levy, was \$4.56 per barrel; at the time of the replevin, it was \$4.43; and at the time of the defendant's election, it had risen to \$6.25. The referee before whom the cause was tried, took the last value, and gave interest thereon. On a review of this decision, the Superior Court of New York went into an elaborate examination of all the cases on the subject, and came to the following conclusions. They held, in the first place, that the rule for ascertaining the sum to be received by the injured party in all cases where personal property is wrongfully taken or detained, whether by force, fraud, or process of law (leaving out of view the exceptional cases in which exemplary damages are given), ought to be the same without reference to the form of action; and that it was *that the owner to whom compensation is due must be fully indemnified, and the wrongdoer not permitted to derive any benefit or advantage from his wrongful act; and that this just indemnity will be arrived at by adding to the value of the property, at the time the owner is dispossessed of it, the damages which he is proved to have sustained from the loss of its possession, and every increase of value which the wrongdoer has obtained or has it in his power to obtain; and that the highest price at which the property could have been sold at any time after the cause of action accrued, cannot be considered the measure of damages, unless the evidence shows that such higher price could have been obtained by the true owner or has been in fact received by the wrongdoer.* And in the principal case, judgment was given according to the price of the flour when replevied.†

In the other States of the Union, the decisions are not har-

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\* This case was reversed in error, 26 Wend., 841, on a question growing out of the Statute of Frauds; but the rule of damages was not touched.

† *Suydam vs. Jenkins*, 8 Sandford S. C., 614, per Duer, J. The opinion is very able, and deserves careful attention.

monious. In regard to the general principle, undoubtedly there is no variance ; but whether the payment of the price alters the rule and gives the plaintiff a right to greater damages, does not appear clear.

The question has been considered but not determined, by the Supreme Court of the United States. Where a contract was made\* to re-deliver to the plaintiffs flour left with the defendants and not paid for, the plaintiff only claimed damages at the rate of the price of flour on the day fixed for delivery ; and though the case went up to Washington, nothing was decided.

In an action brought in Louisiana,† by petition or libel, the forms of action of the English law being there unknown, on a contract for the delivery of cotton at 10 cents per pound, on or before the 15th day of February, when the article was 12 cents per pound, it appeared that it had risen to 30 before the suit was brought ; the plaintiffs insisted that they were entitled to the highest market price up to the rendition of the judgment. But the unanimous opinion of the Court was, “ that the price of the article at the time it was to be delivered, was the measure of damages.”‡ Marshall, C. J., said, “ For myself only, I can say that I should not think the rule would apply *to a case where advances of money* had been made by the purchaser under the contract. But I am not aware what would be the opinion of the court in such a case.”

This distinction between contracts executory and partially executed, does not appear to be recognized in Massachusetts.§ An action was brought against a corporation which had increased its capital, by an original subscriber, for not permitting him to subscribe for new stock. The point decided by both the judges who delivered opinions was, that the chattel not being paid for, the price at the time of delivery was the rule of damages. The language, however, of Sedgwick, J., is very broad ; he says : “ The general rule invariably adhered to here is, that the price of stock at the time it should be transferred or delivered, shall be that by which the damages shall be assessed ;

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\* *Douglass et al. vs. McAllister*, 8 Cranch, 298.

† *Shepherd vs. Hampton*, 8 Wheat., 200.

‡ And this appears to have been adhered to in that State. *Arrowsmith vs. Gordon*, 8 La. Ann. R., 105.

§ Opinion of Sewell, J., in *Gray vs. The President of the Portland Bank*, 8 Mass. R., 264.

and the same rule applies to other personal property." But it will be noticed that the price of the stock had in this case only been tendered.\*

In Pennsylvania, in the Circuit Court of the United States, in an action for not delivering teas of the price fixed by the contract,† Mr. J. Washington laid down the general rule as we have found it above, without adverting to the distinction which we are now considering:

In Connecticut, it has been held that where the price is paid in advance, the advance at all events can be recovered without any investigation into the state of the market. In a case in that State suit was brought on an agreement to deliver flour. The plaintiff paid part of the price in advance. At the time fixed for the performance, flour had fallen in price, and it was held that he was entitled to recover his advance with interest. It was admitted that where one contracts to deliver any article other than money, and fails to do it, the rule of damages is the value of the article at the time and place of delivery, with interest for the delay, because it is supposed that the party will have supplied himself elsewhere with the article at that price; but it was held that this reasoning did not apply to a case where the defendant had violated his contract and retained the plaintiff's money without consideration.‡

In a case in the same State, on an agreement by the defendant to give a deed of certain land in consideration of the transfer to him of a farm worth \$2,000, the defendant insisted that the plaintiff could only recover the value of the farm conveyed by him, and it was so held at the trial. But the rule that the value of the article at the time and place of delivery, and interest for delay, furnished the measure of damages was again declared by the Court. It was said "that the *consideration of*

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\* In a later case in Massachusetts, the Supreme Court declares the general rule of damages on all contracts to deliver goods on demand, to be the value of the property at the time of the demand; and the Court also repeats the assertion, the precise correctness of which we have heretofore examined, that on all contracts and obligations, the party injured by the breach or non-performance, is entitled to a *full indemnity*. *Swift vs. Barnes*, 16 Pick., 194.

† *Gilpin vs. Consequa*, Peters C. C. R., 85.

‡ *Bush vs. Canfield*, 2 Conn. R., 485. See an able dissenting opinion by Hoar, J. This case presents, in fact, the question whether the loss by the depreciation of the article should fall on the vendor or purchaser; the Court, in awarding to the plaintiff his advance and interest, really extricated him from a losing bargain.

*a contract* is never the rule of estimating the damages for the breach of an express agreement ;” and a new trial was granted.\*

The whole subject has, however, recently been reviewed in that State, and the rule as established in England has been finally adopted,† the court saying, “that it was founded upon principles of natural justice.”

In Pennsylvania, any difference resulting from the payment of the price has been distinctly rejected. Woolston bought of Bosler 13,000 *morus multicaulis*, and paid the price ; the trees were not delivered. Smethurst, the defendant, gave a guaranty for the performance by Bosler of his contract to deliver the trees on five days’ notice. Smethurst being proved liable, the defendant insisted that the measure of damages was the value of *morus multicaulis* at the time of the breach of contract, or about that time. But the judge who tried the cause said that the sum paid by Woolston, the plaintiff, to Bosler, furnished the rule. On writ of error, the Supreme Court of Pennsylvania held the charge wrong. After noting the case of *Shepherd vs. Hampton*, above cited, the Court said, “It is evident that C. J. Marshall failed to advert to the difference between a suit on the contract itself, and a suit grounded on the rescision of the contract.” In the latter case, the Court said, “The money paid could be recovered ; but in the former, the value must be always the measure of damages.”‡

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\* “The reason of the rule,” (said Hoarmer, J.,) “is so complete and obvious, that it has been universally embraced, except in cases of stock contracts ; and the anomaly in such cases has arisen from the specific relief which chancery has been in the habit of giving, and which courts of law, not universally, but in most instances have in substance, thought proper to pursue. Whenever a case on this subject occurs, I shall be desirous of putting an end to this exception without cause, by the establishment of perfect uniformity, as no just reason can be assigned for any discrimination.” *Wells vs. Abernethy*, 5 Conn. R., 222.

† *West vs. Pritchard*, 19 Conn. R., 212.

‡ *Smethurst vs. Woolston*, 5 Watts & Serg. R., 106. The language of Rogers, J., is as follows : the distinctions are very acute.

“The value of the article at or about the time it is to be delivered, is the measure of damages in a suit by the vendee against the vendor, for a breach of the contract. This principle is ruled in *Meason vs. Phillips*, (Addison, 846) ; is recognised in *Edgar vs. Boies*, (11 S. & R., 452), and is in effect affirmed by all the authorities cited. Indeed, the general principle is not denied, but it is contended that this is an exception ; that the rule holds good only when the purchase money has not been paid, but that when the purchase money has been advanced by the vendee, the measure of damages is the sum paid or the value of the article which forms the consideration of the contract. But for this distinction, no authority has been cited except a *dictum* (doubtless entitled to great respect) of Chief Justice Marshall, in *Shepherd vs. Hampton*, 8 Wheat., 204.



It may be proper to notice how complete is the contrariety of these decisions. One may well be tempted to exclaim with

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After affirming the general principle, he adds, "For myself only, I can say that I should not think the rule would apply to a case where advances of money had been made by the purchaser under a contract; but I am not aware what would be the opinion of the court in such a case." Taking the remarks of the Chief Justice in the broadest sense, and supposing them to be directly applicable to the case in hand, (of which there is some room to doubt,) it is very evident that he failed to advert to the difference between a suit on the contract itself, and a suit grounded on the rescision of the contract. But this distinction, which pervades all the authorities, governs the whole case; for the purchaser may declare specially for the breach of the contract, or simply for money had and received, to recover back the deposit, if any be made, or the purchase money if it be paid, or he may join both causes of action in the same declaration. And when this is done, it is granted that under the money count, the money advanced may be recovered back, or where a specific article has been given in satisfaction, the purchaser may, when default is made, elect to consider the contract at an end, and recover the article itself, or its value, from the vendor. But on the other hand, where the purchaser declares specially for breach of the contract, and thereby affirms it the only rule of damages, is the value of the article, at or about the time it is to be delivered.

"Where the vendor fails to deliver the article bought, the purchaser may elect to rescind the contract and recover back the money paid, or he may bring suit on the agreement, and recover the value at or about the time it ought to have been delivered. And this is a just rule, for if it has risen in value he has the advantage of the increased price; if it has decreased, why should he, when he adheres to the contract, recover more from the vendor than for the injury he has sustained by the non-performance of the agreement? And the vendee has the less reason to complain, because he may, as before stated, rescind the bargain and place himself in the same situation as before it was made. It is said that the vendor is in the case supposed in default, and this is true; but where *there is any circumstance of aggravation, which is rarely the case, the jury may do justice by a liberal estimate of the value of the goods.* It has been suggested that the contract, on failure of the vendor to perform his part of it, is *ipso facto* rescinded; but this is a novel idea, for it can be rescinded only with the assent of the vendee, who may in a given case elect to consider the agreement at an end. And in the latter case, that is, where the purchaser agrees that the contract be rescinded, the remedy against the guarantor is gone; for it is only on the footing of the subsistence of the contract between the vendor and vendee which he guarantees that he is liable. This is so plain as not to need the aid of argument. It is very true that a deposit, or even the interest on a deposit, may, in certain cases, be recovered on a special count against the vendor. But these cases form rather the exception than the rule. Usually the damages sustained are much less than the deposit; and besides, this is necessary, for otherwise it could not be recovered at all against the vendor, who has not received the money, the deposit being in the hands of the auctioneer, and he alone is liable for money had and received. Besides, the cases cited are on sales of lands by auctioneers, and the same rules cannot hold as on the sale of chattels; for lands, unlike stocks, &c., have no market value. There is nothing in the suggestion that the agreement takes the case out of the general rule. The suit is brought for breach of an agreement, the performance of which the defendant agreed to guarantee. It is, therefore, from necessity, a suit in affirmance of the contract. The defendant agrees, in effect, that if the vendor fails to perform the agreement, he will pay the value of the trees at the time they ought to have been delivered."

"When we come to the subject of warranties, we shall see that the right to rescind, here declared, is more than doubtful; nor can it be considered correct to leave a ques-

Vinnius, "*Quaestio haec valde perplexa est, nullusque est hodie vel iudex, vel patronus, vel juris consultus, qui non haereat, maneatque suspensus quoties, cum condemnatio facienda in rei petita aestimationem, quaeritur ad quod tempus aestimatio referri debeat.*"\* In the courts of England and Connecticut, it would seem that if the price be paid in advance, the vendee is entitled to the highest value up to the time of trial, and the right to rescind is denied. But the judges of these tribunals do not appear to agree upon the question which presents itself where the article falls in value after the price is paid.

In New York, the subject seems to be thrown into confusion by the introduction of a new qualification; while in Pennsylvania, the right to rescind is maintained, and the vendee, even where he has paid the price, is only allowed to recover according to the value of the article, unless under the count for money had and received. In this perplexing conflict of opinion, I am admonished to refrain from any dogmatical declaration of the existing rule; and this especially as it cannot be denied that some doubt has been thrown on the entire subject by a late decision of the Court of Exchequer in England.

In a recent case in that court, the defendants, in 1833, agreed to sell and deliver on board the plaintiffs' vessel, a certain quantity of Odessa linseed, at that place, at 30s. per quarter. The plaintiffs' vessel arrived at Odessa, and they paid the defendants £1,575 in October, 1833, being a moiety of the purchase money of the expected cargo. The defendants gave notice that they could not comply with the contract. In February, 1834, when the cargo would have arrived in England, if it had been delivered to the plaintiffs at Odessa, the price was from 47s. to 50s. per quarter; at the time of trial it would have been about 56s. The defendants paid into court, in September, 1835, £2,072, which was at the rate of 47s., and which was paid over to the plaintiffs, who contended that as they had paid a portion of the purchase money and lain out of it for a long time, they were entitled to damages according to the price at

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tion of this kind to a jury with any instructions so vague or dangerous, as that they are at liberty to make "a *liberal estimate*" of the value of the property."

It will be perceived, also, that this decision is directly opposed to that above cited from Connecticut, throwing the loss of the speculation on the plaintiff.

\* Vinnius, *Selectae Questiones*, Lib. 1, Ch. 89.



which the seed was selling at the time of the trial. Lord Abinger, at the trial, charged, "that in his opinion the plaintiffs were not entitled to treat this as a case resembling contracts for the re-placing of stock where the damages are estimated at the price of the funds, and they were not entitled to damages according to the then price of the seed, and that taking the price at the time the cargo would arrive, it appeared to him that enough had been paid into court; but with these observations he left the case to the jury for their deliberation," who, designing, as Lord Abinger remarked, to give no more than the *money advanced and interest on it*, found a verdict for the defendants. A motion was made for a new trial, on the ground of misdirection, but the rule was discharged.

Lord Abinger, C. B., said, "The plaintiffs did not prove that they wanted this seed for any particular purpose, or that they sustained any peculiar injury from its non-delivery. I told the jury that neither the witnesses nor the plaintiffs had pointed out any precise line which should mark the proper estimate of the damages; for they had not stated what they had intended to do with the seed, whether to crush it or to sell it. The plaintiffs, however, insisted that they were entitled to the profits which they might possibly have made upon it, if it had been delivered. The jury appeared to me to wish to give no more than the money advanced and interest upon it. I am not aware of any rule for estimating damages for speculative profits, besides taking the interest on the money advanced. It was not proved that the plaintiffs could have made more than 5 *per cent.* on that money, or that they had not credit at their bankers' to that extent, and thereby had sustained any peculiar inconvenience. The money had been paid into the court, and the plaintiffs received it as soon as the practice of the court allowed them so to do. I felt a difficulty as to how the damages ought to be computed; but one of the witnesses gave something like a rule, which I pointed out to the jury. He said that *Odessa* linseed was about the same quality as *Sicilian* linseed, though it usually sold at a somewhat lower rate. The ship arrived in *England* in *March*. He stated that at that time *Sicilian* linseed was well sold at 50s., and that he himself had furnished good seed at that price; and deducting 2s. for the difference in value, the fair price of the *Odessa* seed was 48s.; and, allowing a discount, the price would have been about that which the defendants had paid into court. It is to be remarked that by the terms of the contract, supposing the cargo to have been shipped in pursuance of it, the plaintiffs would have been obliged to pay the residue of the purchase money at that time. I did not, however, prescribe any line to the jury upon which they ought to proceed; but I told them they ought not to give speculative or vindictive damages."

Alderson, B., said, "The only question in the case was as to the amount of damages. The contract was to deliver a certain quantity of linseed at a cer-

tain time, namely, on the arrival of the ship in London. Previously to that period a notice was given by the defendant, that he was unable to perform his contract. It appears that the price at that time was not the proper criterion for estimating the damages; for, as the plaintiffs had already parted with their money, they were not then in a situation to purchase other seed. The more correct criterion is the price at the time when the cargo would have arrived in due course, according to the contract; when, if it had been delivered, the plaintiffs would have been enabled to re-sell it. Another criterion is to consider the loss of the gain which the party would have made if the contract had been complied with. In the present case, the loss which the plaintiffs have sustained arises from their having been kept out of their money. That is a matter to be calculated by the interest of the money up to the time when, by the course of practice, the money could have been obtained out of court. It appears from the report of the trial, that there were no circumstances submitted to the jury to show that the plaintiff had sustained any special damage. The verdict is, therefore, in my opinion right.\*

There appears no solid reason for making any difference between stock and any other vendible commodity. Where stock is loaned, or the price of the article paid for, in either case the party entitled to the delivery parts with his property on the faith of the contract, and in either case is prevented from using it, up to the time of trial. The question is, whether, in either case, the law should act on the assumption that the plaintiff would have retained the property if the contract had been complied with, till the period of the highest value, and have realized that price, and thus give damages which are purely conjectural. It will be noticed that in the case of *Clark vs. Pinney*,† it was intimated by the Supreme Court of New York, that the rule ought to be limited to the case of articles intended for sale; and that in *Startup vs. Cortazzi*,‡ it was suggested that the plaintiffs had given no proof of the purpose for which the article was intended; the niceness of the first distinction, the difficulty of furnishing satisfactory proof under the second head, and the general policy of the law which denies conjectural relief, seem to me strongly to point to the period of breach as the true time, in all cases, of estimating the damages, unless it be shown that the article was to be delivered for some specific object known to both parties at the time, and that thus a loss within

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\* *Startup vs. Cortazzi*, 2 Cr. Mees. & Roscoe, 165.

† *Supra*, 264.

‡ *Supra*, 272.

the contemplation of both parties has been sustained. The fact of payment in advance throws no light on the injury sustained by the purchaser; nor does it at all increase the probability that he would have retained the article till the rise of price. The value of the article at the time of breach, with interest for delay, and subject to the above exception, seems to me as near an approach to the actual loss sustained, as can be effected, without embarking upon a vague search after facts impossible, in most cases, to be proved with any degree of satisfaction.\*

And if this rule be sound, it applies as well to cases where the property has fallen, as to those where it has risen. The purchaser claims his advance; but if he gets the value of the article at the time of the breach, the contract is performed; and if this sum be less than his advance, his loss is ascribable purely to his own bargain. It may undoubtedly be urged, and with force, that the contract being violated by the defendant, the retention of any part of the plaintiff's money is against conscience. I have already, however, said that in actions of contract, the only object of the tribunal must be to carry into effect the agreement of the parties, as far as possible, and that the motives of the defaulter are not to be taken into view. If this be correct, then certainly it removes the last objection to the adoption of the general rule, that the value at the time of the breach, with interest for the delay, is, with the exception of the defendant's liability to make remuneration for loss resulting from facts

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\* The opinion expressed by Mr. Chancellor Kent is also well worthy of notice. The text of the original edition of this work contained the following passage. "Chancellor Kent, in his Commentaries, Vol. II., 480, Sec. XXXIX., says: 'The general rule is well settled, that in a suit by vendee, for a breach of contract on the part of the vendor, for not delivering an article sold, the measure of damages is the price of the article at the time of the breach.' The learned Chancellor appears here to overlook the distinction resulting, as we have seen, from the payment of the price before-hand, which runs through these cases, and which is entirely analogous to the rule in trover; that the value of the chattel, not at the moment of the conversion, but its highest value up to the time of trial, is the rule of damages." To which the Chancellor, in his sixth edition, replied as follows: "The learned author is mistaken in supposing I had overlooked that distinction. These Commentaries are not calculated to embody all the nice or arbitrary or fanciful distinctions that are to be met with in the Reports. I do not regard the distinction alluded to as well founded or supported. It is disregarded or rejected by some of the best authorities cited. The true rule of damage is the value of the article at the time of the breach, or when it should have been delivered. Mr. Sedgwick seems, himself, to come to that conclusion amid the contrariety of opinion and cases which he cites."—*Kent's Com.*, Vol. II., 480, *Lec. XXXIX.*

within the knowledge, and in the contemplation of both parties at the time of the contract, to furnish the measure of damages.

I may be allowed to say, with great respect for the very able court which decided the case of *Startup vs. Cortazzi*, that the vagueness and generality of its observations cannot be justified; no clear and definite rule can be deduced from it, and the question as to the amount of damages would seem to have been left as a matter for the mere discretionary control of the jury. If the subject of compensation is ever to be reduced to any thing like certainty; if any hope can be entertained that it is to be relieved from the vexatious contradictions and perplexities with which it is now infested, the reins must be held with a firmer hand, and the power of the court over the amount of relief more clearly and definitely declared.\*

In Scotland, indeed, the whole subject that we are now con-

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\* In Louisiana, on an agreement to transfer stock, which afterwards had risen in value, but which had not been paid for, and which, at the time of the breach of the contract, was at the same price, the Supreme Court said that the damages at the time of the default or the breach of contract, are the only damages which the plaintiff can recover. *Vance vs. Tourne*, 13 La. Rep., 225.

It has been held generally, in Maine, in an action on an agreement to deliver certain chattels on demand, that the market value of the property at the time of demand was the measure of damages. *Smith vs. Berry*, 18 Maine R., 122.

In a case in Massachusetts, the contract was, that George should deliver to Quarles 1000 barrels of flour, at \$6 per barrel, at any time within six months—George to give Quarles six days' notice prior to delivery; Quarles to pay the price aforesaid, and either party to be released, if desiring it, within three months, on paying \$500 to the other. This last provision was not taken advantage of. On the 18th of Feb., Quarles demanded it: it was not delivered; and the question was, on what day the damages were to be computed, it being agreed that such damages were the difference between the price mentioned in the contract and the actual value. The Court held that the defendant had to do the first act, i. e., give notice; that he had till 6 days before the 14th of February to give notice; and as, if he had then given notice, he would have had till the last day to deliver the flour, the actual breach by the non-delivery of the flour must be taken to have occurred on that day, and damages were computed accordingly. *Quarles vs. George*, 28 Pick., 400.

Where a purchaser at a sheriff's sale did not fulfill his contract, and the property was re-sold, it was held, in an action by the sheriff, that the measure of damages was the difference between the first and second sales. *Gaskell vs. Morris*, 7 Watts. & Serg., 83.

In Kentucky, where one Loder covenanted to furnish Allen, by a given day, two slaves, in consideration of \$450 then paid, and \$210 to be paid on their delivery, it was said by the Court of Appeals, that, "for a failure to furnish the slaves according to contract, the obligors were liable for damages to Allen. The measure of those damages was the value of the negroes described at the time and place of performance. This was the province of the jury to ascertain. It has done so, and the amount of consideration did not form a subject of material inquiry." *Loder vs. Allen*, 2 Bibb, 838.

sidering, has been distinctly declared to belong to the province of the jury, who are to be allowed to enter into a wide range of investigation into the objects of the parties, the purpose of the contract, and the conduct of the defaulter. Where the defendants had *wrongfully* failed to deliver certain hemp at St. Petersburg, and the plaintiff could not have supplied himself at that place during the season with the article, the whole matter was very elaborately considered, and the English rule rejected. It should be mentioned, that the price of the article had not been paid; but no stress is laid on this fact. Lord Medwyn, who delivered the leading opinion of the Court of Session, said that,

“The law of England, taking as the standard the market price of the article on the day fixed for delivery, appeared to be adopted chiefly in regard to articles of ordinary production in the country, as bacon, tallow, &c., where the same article may be easily procured in the market, and where the party could easily supply himself if disappointed by the seller.”

He then proceeds to examine the Scotch cases, and deduces from them the following principles:

*First.* “That the damage will be differently estimated according as the failure to implement (perform) has been thought the fault of the seller or not. In the latter case, on payment of the loss actually incurred, the seller ought to be free. Equity interposes to make the damage as light as possible.”

*Second.* “But this principle will not apply, and equity cannot be pleaded if the non-delivery has arisen from the fault of the seller, in order to obtain a higher price from another. \* \* But circumstances in the buyer's conduct also may affect the estimate of damage due to him, even where the non-implementation has been blamable; for it is indemnification of loss merely he is entitled to, and his claim does not proceed on the principle of punishment for a wrong.”

*Third.* “Hence if the buyer had before delivery re-sold the article, he can claim only the difference of price between the two sales, as this is the amount of his loss, unless the parties who made the purchase also claim and obtain damages.

*Fourth.* “If the person supplied himself at the market price with the article, he must limit himself in his claim of indemnification to the difference between the price paid and the contract price, although he could show that the seller, by the rise of the market, had made double the sum by non-delivery.”

The learned Judge then proceeds to inquire:

“What is the legal rule for fixing the damage in a case where the non-delivery is wilful and performance (implement) refused?” And he says, “The

conclusion would not seem unreasonable, that if this is withheld by the seller for the gain he is to make or has made by disposing of it to another at a higher price, the purchaser is entitled to have the highest price of the article till the decree is pronounced in his favor, provided always there be no undue delay in bringing his action, and no improper delay in carrying it on, and that if the market has been rising all along, the very highest price prior to decree is to be assumed as the estimate of the damage."

But after stating that the English and the civil law are against this rule, he proceeds :

"The reason for resisting such a mode of estimating the damage is, that it gives the plaintiff (purchaser) the utmost price of speculation without any risk of loss, and takes it from the seller, who, unless he has held on to the goods (a very unlikely supposition, as the temptation to dispose of them about the time of breaking the contract probably led to it), will be made to suffer not only much beyond his own profit, but will be compelled to put into the pocket of his adversary much beyond indemnification for his loss. \* \* This further reason may be assigned against this rule for estimating damage, that much uncertainty and great inequality would be introduced into such claims." He then proceeds, "Still, it is to be inquired whether there is any principle in our law for claiming as damages the profit which might have been made by a sale of this article in a rising market. \* \* There really seems to me to be much good sense in this conclusion, that no fixed rule as to time will suit each case, but that it may vary according to circumstances. \* \* In estimating damage we are entitled to look at the use the one party intended to make of it, and which the other might presume was intended. It is upon this principle that the seller is only bound to repair the loss which relates to the thing itself, and which results directly from it, not consequential damage. It is that only which the parties are called upon or can be supposed to contemplate at the time of the sale or the breach of bargain. And if the article were purchased by a dealer in it, with a view to be re-sold for profit, and this was in the contemplation of both parties, I am unable to see how that can be laid out of view in estimating the loss sustained by non-delivery, more especially when that very advantage which the purchaser would have had, the seller has obtained, and which in fact has occasioned his bad faith in the transaction. \* \* In the present case, it must be held that the defenders could have given delivery and that they only put it out of their power wilfully and wrongfully, in order to obtain a higher price for it; that this higher price is now in their pocket, which would *most probably have been* the profit on the sale of the article by the purchaser. \* \* We cannot doubt that the higher price was the temptation for their breach of bargain; and I think that this affords the true estimate of damage. I am quite aware that this throws much uncertainty into every case, but not greater than if we adopt either the date of the summons or of the verdict as the period for estimating damage; one would probably give too little, and the other too much in a rising market. I see no better principle than this, in such



a case, that the profit which the one would have made, the other probably has made; and justice requires that the one should not suffer, nor the other benefit by his own wrong. No doubt it is the price of speculation without any risk of loss; but if we reject the price at the date of delivery as offering any encouragement to bad faith in a rising market, and also the date of citation or of verdict as putting it too much in the purchaser's power to protract his judicial demand and influence his claim to what he never would have obtained as a profit, nor the other party have secured by the actual sale of the article, I really do not see what other rule can be adopted. It is always a difficult matter to fix on the amount of damage; the elements out of which they are to be estimated are various and anomalous. I think it is *peculiarly a jury question*.\*

Having thus endeavored to arrive at the general result that the market price or value on the day of the breach controls the measure of damages, it still remains to be seen how that value is to be determined.

In a case on the Pennsylvania Circuit,\* where suit was brought on a contract to deliver coffee, not paid for, the rule was declared to be the market price on the day fixed for performance; but it also became necessary carefully to determine what was the market price. In charging the jury, Baldwin, J., said, "You must take what you believe the market price or value, but may take the range of the market as proved by the witnesses, fixing on the highest, lowest, or medium rate at your discretion. We think the rule applicable to contracts to deliver stocks a correct one in cases of this kind, by keeping within the range of the market on the day of delivery, to fix on the higher, lower, or medium value, as the breach of the contract may have been wilful or innocent in your opinion. The plaintiff is entitled to your verdict for such value, with interest from the day of delivery." A motion was made to set aside the verdict, on the ground of excessive damages, which was granted; and in delivering his opinion, Hopkinson, J., said:

"It is the price, the market price of the article that is to furnish the measure of damages. Now, what is the price of a thing, particularly the market price? We consider it to be the value, the rate at which the thing is sold. To

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\* *Watts vs. Mitchell*, 1 *Dunlop*, Bell and Murray Session Cases, 1157. The whole case should be carefully examined. See, also, *Dunlop vs. Higgins*, in House of Lords, 12 *Jurist*, 295, where the power of the jury over the subject is distinctly declared to be the Scottish law.

† *Blydenburgh et al. vs. Welsh*, 1 *Baldwin*, 881.

make a market there must be buying and selling, purchase and sale. If the owner of an article holds it at a price which nobody will give for it, can that be said to be its market value? Men sometimes put fantastical prices upon their property. For reasons personal and peculiar, they may rate it much above what any one would give for it. Is that its value? Further, the holders of an article, as flour, for instance, under a false rumor, which if true would augment its value, may suspend their sales or put a price upon it, not according to its value in the actual state of the market, or the actual circumstances which affect the market, but according to what in their opinion will be its market price or value provided the rumor shall prove to be true. In such a case it is clear that the asking price is not the worth of the thing on the given day, but what it is supposed it will be worth at a future day, if the contingency shall happen which is to give it this additional value. To take such a price as a rule of damages, is to make a defendant pay what never in truth was the value of the article, and to give the plaintiff a profit by a breach of the contract, which he never could have made by its performance.

"The law does not intend this; it will give a full and liberal indemnity for the loss sustained by the injured party, and means to impose no higher penalty than this on the defaulter."

Where a given place is fixed on by the parties as that for delivery, it seems to be well settled that the inquiry as to prices is limited peremptorily to that particular place. So in New York, where assumpsit was brought for breach of a contract to deliver 100,000 shingles at a landing-place called Bailey Town, on Seneca Lake, on the 1st of June, 1828, for which the plaintiff was to pay \$125, or \$1.25 per thousand, the plaintiff proved the value of the shingles at the place of delivery on the day (1st of June) to have been \$1.87 or \$2.00 per thousand. The defendant was allowed to prove the value of shingles at Geneva, *and other places*, and from an *average of prices* to find the value; but, the plaintiff moving for a new trial, this was held wrong, and that the true rule of damages was the difference between the price as fixed by the parties on the day and *at the place* of delivery, and the market value at the same time and place; and a new trial was ordered.\*

Contracts of sale may be broken by the seller in still ano-

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\* Gregory vs. McDowell, 8 Wend., 435. In a case in Arkansas, in an action on an agreement by which Hanna sold Harter ten hogs, the defendant below refused to deliver, it was held that the measure of damages was the difference between the price agreed on between the parties and the market price of the pork at the time of the delivery at the place fixed on by the agreement. Hanna vs. Harter, in Error, 2 Ark., 397.



ther mode. The goods when tendered by the vendor may not prove to be of the kind or quality required by the contract. In such case the vendee must either affirm or rescind the contract *in toto*. The buyer cannot, on receiving a part of the quantity sold, retain it, and claim damages for the non-delivery of the entire quantity. Nor can he require the delivery of the residue, retaining a claim for damages. He must either receive the article as it is ; or he must return the portion delivered, and then enforce his claim for damages.\*

We have already considered this subject in regard to notes payable in specific articles,† and have also examined a class of barter contracts,‡ where the price of the article sold is agreed to be paid not in money but some certain specific article. In all these cases the sound rule seems to be that the parties shall be considered as having elected a criterion of value different from the ordinary pecuniary standard ; and having so made their contract, the only duty of the courts is to enforce it by awarding the value of the thing agreed to be delivered in payment.

Having thus considered the measure of damages as against the vendor, when he fails to deliver the article contracted for, we have now to examine the corresponding questions as to the purchaser, upon his failure to make payment.

In these cases, the contract fixes the price or it does not. If this point be left doubtful, and the vendee re-sell the article, he can be made liable for the price received, deducting usual charges and commissions. He is treated as a trustee or agent of the plaintiff, selling on his account and for his benefit ; and it is both equitable and legal that having received the money he should pay it over to the owner, after retaining a due compensation for his services.§ But this is a very unusual case, and the contract generally fixes the price.

Where a vendee is sued for non-performance of the contract on his part, in not paying the contract price, if the goods have been delivered, the measure of damages is of course the price named in the agreement ; but if their possession has not been changed, it has been doubted whether the rule of damages is

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\* *Shields vs. Pettee*, 2 Sandf. S. C., 262.

† *Supra*, 239.

‡ *Supra*, 203.

§ *Greene vs. Bateman*, 2 Woodb. & M., 359.

the price itself, or only the difference between the contract price and the value of the article at the time fixed for its delivery. It seems to be well settled in such cases, that the vendor can re-sell them if he see fit, and charge the vendee with the difference between the contract price and that realized at the sale.\* Though perhaps more prudent, it is not necessary that the sale should be at auction; it is only requisite to show that the property was sold for a fair price.† But if the vendor does not pursue this course, and without reselling the goods sues the vendee for his breach of contract, the question arises which we have already stated, whether the vendor can recover the contract price, or only the difference between that price and the value of the goods which remain in the vendor's hands; and the rule appears to be, that the vendor can recover the contract price in full.

In a suit brought by vendor against vendee, the plaintiff had contracted to sell the defendant three hundred tons of Campeachy logwood; "such as may be determined to be otherwise by impartial judges, to be rejected;" the defendant refused to accept the wood offered, because it was not all Campeachy logwood; it was insisted on his behalf that he was not bound by the contract price, as a part only of the stipulated quantity had been furnished; and that the measure of damages was the difference between the contract price, and what the article would have sold for at the time when the true quantity of Campeachy logwood was ascertained. But the Court of King's Bench held, that the defendant was bound to take the part which was Campeachy, and that he having repudiated the whole contract, the measure of the damages was the whole contract price on that quantity, i. e., the Campeachy wood.‡

The question has been considered in New York, and decided

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\* *Langford vs. Tyler's Adm'r.*, 1 Salk., 118; S. C., 6 Mod., 162; *Cuddee vs. Rudter*, 5 Vin., 538; *Sands vs. Taylor*, 5 J. R., 395.

† *White vs. Kearney*, 2 La. Ann. R., 689.

‡ *Graham vs. Jackson*, 14 East, 498. We have already (*supra*, 196), had occasion to consider the analogous doubt that exists as to the measure of damages on contracts for the sale and purchase of lands, whether the vendor having done all in his power to complete his agreement, is at liberty to recover the entire contract price, or confined to the actual injury resulting from the loss of his bargain. See a recent case at Nisi Prius, *Dunlop vs. Grote*, 2 Car. & K., 158, where the plaintiffs in a somewhat special case, held entitled to recover the whole contract price.

in the same way.\* The plaintiff, a carriage-maker, was employed to build a sulkey for the defendant. A due tender having been made of the carriage, and it being deposited with the plaintiff for his use, the defendant having refused payment, and suit brought, it was insisted that the measure of damages was not the value of the sulkey, but only the expense of taking it to the residence of the defendant, delay, loss of sale, &c.; but the court held otherwise, using this language :

“ Upon principle, I would ask what should be the rule? A mechanic makes an article to order, and the customer refuses to receive it; is it not right and just that the mechanic should be paid the price agreed upon, and the customer left to dispose of the article as he may? A contrary rule might be found a great embarrassment to trade. The mechanic or merchant, upon a valid contract of sale, may after refusal to receive, sell the article to another, and sue for the difference between the contract price and the actual sale.

“ Where there has been a valid contract of sale, the vendor is entitled to the full price, whether the vendee receive the goods or not. I cannot see why the same principle is not applicable in this case. Here was a valid contract to make and deliver the sulkey. The plaintiff performed the contract on his part; the defendant refused to receive the sulkey. The plaintiff might, upon notice, have sold the sulkey at auction; and if it sold for less than \$80, the defendant must have paid the balance. The reason given for this rule by Kent, Ch. J.,† is, that it would be unreasonable to oblige him to let the article perish on his hands, and run the risk of the insolvency of the buyer. But if, after tender, or notice, whichever may be necessary, the vendor chooses to run that risk, and permit the article to perish, or, as in this case, if he deposit it with a third person for the use of the vendee, he certainly must have a right to do so, and prosecute for the whole price. Suppose a tailor makes a garment, or a shoemaker a pair of shoes, to order, and performs his part of the contract, is he not entitled to the price of the article furnished? I think he is, and that the plaintiff in this case was entitled to his verdict.‡

So in Massachusetts, where a contract had been made for the purchase of railway shares, and a part of the price paid,

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\* Bement vs. Smith, 15 Wendell, 498.

† Sands vs. Taylor, 5 Johns. R., 411.

‡ It has been held in Pennsylvania, where goods are sold at auction on credit, and the vendee refuses to take them, the owner may, before the expiration of the credit, sue the vendee for his breach of contract; and in such case, the measure of damages is the difference between the price agreed to be paid for the goods and their value at the time that the vendee refused to take them. This is clearly so, because no action can be brought *for the price* of the goods until the time of credit is expired. But in this case, Gibson, J., proceeded to say: “ Properly speaking, the seller cannot *recover the price when he has retained the goods* in consequence of the buyer's refusing to comply with any part of the contract.” Girard vs. Taggart, 5 Serg. & R., 19.

and the vendor caused them to be transferred on the books of the company, but the defendant refused to accept them after such transfer, it was held that the measure of damages was the contract price.\*

Where, however, the plaintiff has not the goods that he agrees to sell, but makes a side-contract with another party to furnish them, he will only be allowed to recover the difference between the original contract price and the market price at the time of the offer, with interest.†

Where goods are sold to be paid for by a note or bill payable at a future day, and the note or bill is not given, it is well settled in England and in this country, that the vendor cannot maintain assumpsit on the general count for goods sold and delivered, until the credit has expired; but he can sue immediately for a breach of the special agreement.‡ And in New York it has been held, that in such action, he will be entitled to recover as damages the whole value of the goods, with the suggestion that there should be a rebate of interest during the stipulated period of credit;§ the court, Bronson, J., saying, "the right of action is as perfect on a neglect or refusal to give the bill as it can be after the credit has expired. The only difference between suing at one time or the other, relates to the *form of the remedy*. In the one case, the plaintiff must declare specially, in the other he may declare generally. The remedy itself is the same in both cases. The damages are the price of the goods. The party cannot have two actions for one breach of a single contract, and the contract is no more broken after the credit expires than it was the moment that the bill or note was wrongfully withheld."

So in a case in Pennsylvania,|| it was charged at the trial,

\* Thompson *vs.* Alger, 12 Met., 428.

† Stanton *vs.* Small, 8 Sandf. S. C. R., 280. So, too, in Ohio, McNaughten *vs.* Casally, 4 McLean, 581; though in this case it is said a portion of the property was ready to be delivered.

‡ Mussen *vs.* Price, 4 East, 147; Dutton *vs.* Solomonson, 3 Bos. & Pull., 582; Hoskins *vs.* Dupervy, 9 East, 498; Hutchinson *vs.* Reed, 8 Camp., 329; Loring *vs.* Gurney, 5 Pick., 16; Hunneman *vs.* Inhabitants of Grafton, 10 Met., 454.

§ Hanna *vs.* Mills, 21 Wend., 90. In the English cases nothing is said as to the amount which the plaintiff is entitled to recover. In the case of Hutchinson *vs.* Reed, the plaintiff, though without discussion, was permitted to take a verdict for the price of the goods.

|| Rinehart *vs.* Olwine, 5 Watts. & Serg., 157.

that where goods are sold on credit, the vendee to give his note, which he refuses to do after the goods are delivered, suit may be brought for a breach of the contract before the expiration of the credit, in which case the measure of damages is the price of the goods. It was insisted that the measure of damages was the injury actually sustained by not receiving any security for the goods. But the direction was held right.\*

An effort has been made in many cases by the purchaser to relieve himself from the contract of sale before the time fixed for performance, by giving notice that he would not be ready to complete the agreement, and in these cases it has been insisted that the damages should be estimated as at the time of giving notice; but the English courts have justly denied the right of either party to rescind the agreement; and have adhered to the day of the breach as the period for estimating the damages.

In an action of assumpsit by plaintiff against defendant for not accepting a quantity of wheat which the plaintiff, early in January, 1839, contracted to sell to the defendant, to be delivered at Birmingham, as soon as vessels could be obtained for the carriage thereof, the defendant gave notice, on the 26th of January, that he would not accept the wheat if delivered—wheat having then fallen in price. It was at that time on its way to Birmingham, and on its arrival was offered to the defendant; but he refused to take it. On the trial it was contended that the measure of damages was the difference between the contract price and the price on the 26th of January, when notice was given. But, on argument, the Exchequer held that

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\* In a somewhat similar case, the same rule was laid down in Connecticut; the defendant promised the plaintiff to give a note immediately for one hundred dollars, payable in sixty days. On refusal to give the note, and before the expiration of the sixty days, suit was brought; and it was insisted that the plaintiff could only recover nominal damages. But the Court held the plaintiff entitled to recover the full amount of the note, saying, "The plaintiff can have no other action than upon this special contract; and it is very obvious that in some action and at some time, he is entitled to recover the actual damage sustained, one hundred dollars, which the defendant promised to pay. The special promise of the defendant to give his note, was as effectually broken when the action was commenced, as it was after the expiration of the sixty days; and if the plaintiff recover nominal damages now, we do not see but he will be debarred from a recovery of his actual damages hereafter; because, if he sues again, he can only sue for the same breach of promise, in the same form of action, and in the same manner of declaring as he is now doing. The second action would be for the same cause of action as the first, and must so appear to be from the record itself."—*Stoddard vs. Mix*, 14 Conn., 12.

the true rule was the difference between the contract price and that on the day when it was offered at Birmingham ; and they relied on the case of *Leigh vs. Patterson*.\*

So in another case,† which was an action of assumpsit for not accepting certain railway shares, the contract of sale was made on the 26th of August, 1840 ; on the 7th of September, the defendant refused to take them. On the 15th the plaintiff re-sold the shares at a loss of £161 from the price agreed on ; and the jury, under the charge of the judge, found a verdict for this amount. The defendant on a motion for a new trial, insisted that the damages should have been calculated only to the 7th of September, when the defendant declared off. But Alderson B., said, “the damages are to be calculated at the difference between the contract price and the price to be obtained within a reasonable time after the breach of contract ; and it was for the jury to say what was such reasonable time.”

So where a person had contracted for a certain quantity of oil, it was held, that in an action for not accepting and paying for the oil, the proper measure of damages was the difference between the price he had contracted to pay for the oil, and the market price at the time when the contract was broken.‡

The same question that we have heretofore discussed in regard to notes and bills of exchange when made in one country and put in suit in another, may arise in regard to sales, and in such a case it has been held in New-York, that when goods have been purchased in England, and the vendee is sued here for the price, the creditor can recover the price at the par of exchange only.§

In a late case¶ it was held in Massachusetts, that where the defendant had agreed to deliver a certificate of ten shares of the corporate stock of a certain manufacturing company, whose capital was to be one hundred thousand dollars, divided into not more than 200 shares ; and instead thereof made a tender of a certificate of ten shares of the stock of the company, of which only thirty-four thousand dollars were paid, divided

\* *Philpotts vs. Evans*, 5 Mees. & Wels. R., 475. Supra, 268.

† *Stewart vs. Cauty*, 8 Mees. & Wels. R., 160.

‡ *Boorman vs. Nash*, 9 Bar. & C., 145.

§ Supra, 237.

¶ *Dyer vs. Rich*, 1 Met., 180.

into seventy shares; that the measure of damages was the value of ten shares in the full capital stock, if it had been made up at the time stipulated, and the company had then been ready in good faith to operate upon the capital, pursuant to their charter.

We come next to the subject of warranties. The contract of sale may be complied with on the part of the vendor, so far that delivery may have been made, but the article may still not satisfy the warranties, either express or implied, that have been made at the time of the sale; and in this case, the rule of damages is now to be investigated. We for the present assume that no fraud enters into the transaction, inasmuch as in that case we shall presently see different rules apply, and, moreover, it transfers the subject of compensation in a great degree to the discretion of the jury. It will be noticed that, in one branch of the question which we now proceed to examine, the rights and liabilities of the parties concerned are often identical with those of principal and surety; but reserving for separate inquiry that subject in its more extended form, we shall confine ourselves at present to the examination of warranties as contained in sales.

In cases of executory contracts, or contracts to deliver a specific article, if on delivery they prove not to satisfy the agreement, the plaintiff, as we have seen, is not bound to retain the articles, but he may return them within a reasonable time.\* So it was originally held in regard to chattels sold with warranty, that if they did not answer the agreement, the plaintiff had his election of two remedies: he might either return the article and recover the price paid; or he might sell the article, and recover damages in an action on the warranty.

The better opinion, however, seems now to be, that where there is no fraud and no agreement to return, the vendee cannot, at his own option, rescind the contract, but has only an action on the warranty.†

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\* *Freeman vs. Clute*, 8 Barb. S. C. R., 424.

† In England the cases were considered, in *Street vs. Blay*, 2 Barn. & Adol., 456; and though the cause was not decided on this ground, strong opinions to the effect were expressed. See, also, in the State of New York, *Voorhees vs. Earl*, 2 Hill, 288. So in Vermont, a warranty and breach of it will only entitle the vendee to recover damages for the breach, and not authorize him to rescind and recover back the consideration money. *West vs. Cutting*, 19 Verm., 536. *Thornton vs. Wynn*, 12 Wheat., 183.



So in New-York it has been said in a case of simple warranty, there being no provision in the contract for the return of the articles, that the title to the property becomes vested in the vendee as soon as delivered, and he can only recover for the difference in value between it as it is in fact, and as it ought to have been.\*

This fluctuation of judicial opinion has produced a corresponding variety of decisions as to the measure of relief. It seems originally to have been held, that the measure of damages in these cases was the difference between the price paid and actual value; but it is now well settled, that the rule is the difference between the actual value, and the value that the article would have possessed if it had conformed to the warranty, the price paid being mere evidence of that value.

In an early case,† Mr. J. Buller, discussing the question whether money had and received would lie on an executed contract, said: "In a late case before me, on a warranty of a pair of horses to Dr. Compton, that they were five years old, when in fact they turned out to be only four, I held that, *as the plaintiff had not rescinded the contract*, he could only recover damages; and then the question was, what was the difference of the value of horses of four or five years old."

In a subsequent case,‡ it was insisted that the plaintiff should have returned the animal which had been warranted sound; but in another case,§ an action being brought on the warranty of a horse sold by the defendant to the plaintiff for £20, the warranty and the unsoundness being proved, the jury was directed that if the horse was kept, the verdict *ought to be for the difference between the value and the price paid*. The jury, how-

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As to the difference taken between sales with warranty, and executory contracts where the chattels may generally be returned as soon as they are found not to satisfy the contract, see *Gompertz vs. Dentz*, 2 Cr. & Mees., 207; *Patteshall vs. Tranter*, 3 Ad. & Ell., 108; *Thornton vs. Wynn*, 12 Wheat., 198. In Maryland the right of rescision is maintained; *Franklin vs. Long*, 7 Gill. & J., 407. In Alabama, fraud and breach of warranty are still held to give an equal right to rescind. So the offer to return in a reasonable time after the breach of a warranty by the vendor, or the discovery of a fraud practised by him will be as effectual to rescind the contract as if the offer had been accepted. *Burnett vs. Stanton*, 2 A. R., 181. In Pennsylvania, also, *supra*, 272. See, also, *infra*, as to right of rescision in cases of fraud.

\* *Freeman vs. Clute*, 3 Barb. S. C. R., 424.

† *Towers vs. Barrett*, 1 Term. Rep., 188, (1786).

‡ *Fielder vs. Starkin*, 1 H. Bl., 17, (1788).

§ *Caswell vs. Coare*, 1 Taunt., 566, (1809).



ever, contrary to this direction, found for the plaintiff £30 10s. : £20 for the horse, and 10 guineas for its keep. The defendant moved for a new trial; and the verdict was reduced to £20, the plaintiff undertaking to deliver back the horse, *free of any expense for its keep*.

The rule of damages here laid down, is the difference between the *sum paid and the actual value* of the chattel, as proved to be deteriorated by the defect warranted against; but as I have already said, this is no longer the law. In another case,\* in an action of assumpsit, on a warranty of soundness in a horse, Lord Eldon spoke of the difference between the value of the article warranted and its actual value when sold, as the measure of damages; but the case did not turn on this point. Recently, however, the precise subject has been considered, and this rule finally adopted.

It was also an action brought for the breach of a warranty.† The plaintiff had bought a horse of the defendant for £45, warranted sound. The plaintiff had sold the horse with warranty to one Collins for £55; Collins returned the horse as unsound; and the plaintiff was obliged to repay the £55, and the animal was sold for £17 15s. The plaintiff claimed, the difference between that sum and £45, the price paid; the expense of bringing the horse to London; his keep from the time of purchase to the sale as unsound; the £10 paid to Collins; £1 15 for an examination of the veterinary college; and £1 15 for opinion of counsel. Lord Denman, C. J., at the trial of the cause said, "As the warranty and the unsoundness are admitted on the record, the only question is the amount of the damages. I am of opinion that the amount of damages is what the horse would *be worth if sound*, deducting the price it sold for after the discovery of the unsoundness, and I think the price at which it was sold to the plaintiff *is not conclusive as to its value*, though I think it very strong evidence. The fair value of the horse, if sound, is the measure of damages, and the sum the plaintiff gave is only the evidence of the value." He refused to allow the £10 paid Collins, because there was no evidence that the horse was worth more than the plaintiff gave for it. The expense of bringing the horse to London, and of keeping him

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\* *Curtis vs. Hannay*, 3 Esp., 82, (1800).

† *Clare vs. Maynard*, 7 Car. & Payne 741, (1837).

there was also allowed. The court was moved for a new trial as to the £10 paid Collins; but they refused to disturb the verdict, saying that this claim in substance amounted to a claim of compensation for the loss of a good bargain, which could not be allowed as damages in such an action.\*

In addition to the remuneration thus given, the plaintiff is entitled to recover the expences of keeping the animal for such a reasonable time as may be necessary to sell him to the best advantage.† Mr. J. Littledale said, in the case first cited, “a contrary doctrine very generally prevailed, but he thought the plaintiff was entitled to recover the expences of keeping for so long a time as might reasonably be occupied in endeavoring to sell the horse to the best advantage.”

The principle that it is the value and not the price which governs the compensation, has been recognized by the courts of this country. In a case in New York,‡ assumpsit was brought on a warranty that 120 barrels of flour were superfine flour, of good quality. The price paid was \$9 50 per barrel: 60 barrels were defective. The defendant's counsel insisted that the measure of damages was the difference in value between the 60 barrels when sold, and the value of superfine flour; but Willard, C. Judge, held at the trial, that the plaintiffs were entitled to recover back the balance of the whole purchase money paid for the 60 barrels, with interest, crediting the amount realized by them from their sale at auction. On a motion for a new trial, Cowen, J., said, “Regarding this case as one of simple warranty without fraud, the measure of damages adopted at the trial was wrong. It should have been the difference between the *value of the sixty barrels* at the time of the sale, considered as good superfine flour, and *the value of the inferior article sold*. The purchaser is entitled to have the article made equal in quality to what the warranty assured it to be.” A new trial was granted.

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\* From the report of this case in the King's Bench, 6 Adol. & Ellis, 519, it appears that a question arose as to the sufficiency of the declaration. The plaintiff insisted that the £10 should be allowed as expences, if not as profit. But to cover this, the court said there was no adequate allegation. See, also, Cox *vs.* Walker, in notes to this case.

† McKenzie *vs.* Hancock, Ryan & Moody, 486, (1826); Chesterman *vs.* Lamb, 2 Adol. & Ellis, 129, (1834); and Ellis *vs.* Chinnoek, 7 Car. & Payne, 169, (1835).

‡ Voorhees et al. *vs.* Earl et al., 2 Hill, 288.

The question has been still more distinctly decided by the same court in another case.\* Gruman sued Cary on a warranty of soundness in a horse; the price paid was \$90, and the breach was a disease of the eyes. The defendant insisted that the proper measure of damages was the difference between the real value of the horse, if sound, and his value with the defect complained of. The court below, however, decided that the measure of damages was the difference between the price paid and the value with the defect. A verdict being found in conformity to this charge, on exception and writ of error, it was said by the Supreme Court:

"The court below erred in laying down the rule of damages. The warranty cannot be satisfied, except by paying to the vendee such sum as, together with the cash value of the defective article, shall amount to what it would have been worth if the defect had not existed. \* \* The rule, undoubtedly, is, that the agreed price is strong evidence of the actual value; and this should never be departed from unless it be clear that such value was more or less than the sum at which the parties fixed it. \* \* It is impossible to say, nor have we the right to inquire, whether the real value of the horse in question, supposing him to have been sound, would have turned out to be more or less than the \$90 paid. Suppose the jury thought, with one witness whom the court allowed to state such value for another purpose, that it was not more than \$80, the plaintiff then recovered ten dollars, not on account of the defect, but because he had been deficient in care or sound judgment as a purchaser. On the other hand, had the horse been actually worth \$100, the defendant would have been relieved from the payment of the ten dollars, because he had made a mistake of value against himself. The cause might thus have turned on a question entirely collateral to the truth of the warranty." And a new trial was granted.

And so the law has been recently declared in Vermont;† and in Alabama;‡ in Virginia also;§ and so in Louisiana.]

From these cases the result is, that in an action brought on a warranty, the true measure of damages is the difference be-

\* Cary vs. Gruman, 4 Hill, 625, (1848), per Cowen, J.

† Woodward vs. Thacher, 21 Verm., 580.

‡ Marshall vs. Wood, 16 Ala., 806.

§ On a warranty of soundness in an animal, the measure of damage is the difference between the value of the animal sound as warranted, and his value at the time of the sale, in the condition in which he really was. And the price at which the animal was sold is the proper evidence of value he would have had at that time, if he had been sound to the extent of the warranty. Thornton vs. Thompson, 4 Grattan, 121.

] Slaughter vs. McRae, 8 La. Ann. R., 455.

tween the value which the thing sold would have had at the time of the sale, if it had been sound or corresponding to the warranty, and its actual value with the defect; that the price is very strong but not conclusive evidence of the value at the period first named; and that the plaintiff is entitled to recover his expences for keeping the article during such time as is reasonable for its advantageous sale. Mr. Chancellor Kent\* seems to prefer the rule as laid down in *Curtis vs. Hannay*, cited above, on the ground of its being in harmony with the measure of damages on the covenant of warranty in the sale of land. But it is proper to notice that the doctrine settled is in analogy to the principle in another class of cases. It has been laid down as a general rule,† in regard to actions for non-performance of contracts (other than conveyances of lands), that the party ready to perform may recover damages to the extent of his injury, and that the price agreed to be paid on actual performance, is not the measure of damages. This also seems the rule in Pennsylvania, where in the case of sale by sample, in an action on the implied representation or warranty, the measure is held to be the difference between the value of the articles delivered and the commodity sold.‡ The rule which we have been considering does not at all apply where fraud intervenes. In such case, as we shall presently more fully see, the contract can be rescinded, the thing returned, and the price paid recovered back, or the party defrauded may stand to the bargain and recover damages for the fraud.§

There is sometimes a warranty of quantity, either expressed or implied, and in that case the purchaser is entitled to have the article made equal in quantity to what the warranty declared it to be, but not to be remunerated for injury remotely resulting from the deficiency.||

The rights of the parties in a case of warranty are not, however, always presented in the simple form that we have just been considering. The vendee in some instances, confiding in

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\* Comm., Vol. II., 480, in notes.

† Shannon vs. Comstock, 21 Wendell, 457.

‡ Borrekin vs. Bevans, 8 Rawle, 28.

§ Campbell vs. Fleming, 1 Ad. & El., 40; 2 Kent Com., 480. Voorhees vs. Earl, 2 Hill, 288. Putnam vs. Wise, 1 Hill, 284, where the doctrine is considered at length in a learned note.

|| Voorhees vs. Earl, 2 Hill, 288; Hargous vs. Ablon, 3 Denio, 406.

the warranty, is subjected to indirect or consequential loss. And the recovery of such consequential loss will depend on the general principles which we have heretofore examined. So where a slave was sold with warranty of soundness, and two months afterwards he received a gun shot wound and died, and it was proved that he had labored under a chronic affection of the lungs at the time of the sale, and but for that disease the wound would not have proved mortal; it was held, notwithstanding, that the vendor was only liable for the diminution of his value at the time of the sale in consequence of the disease, and not for the combined consequences of the wound and the disease.\*

But the vendor may be liable for the expences of litigation incurred in consequence of his warranty. It seems when the chattel has been sold a second time by the vendee, relying on the original warranty, and he is prosecuted by the second vendee, and recovery had, the first vendor, if duly notified of the claim, and it is not unnecessarily resisted, is liable for the whole amount of the damages and costs recovered against the first vendee by the second vendee, as well as his costs of defence. So in an action on the warranty of a horse, the defendant had sold the horse to the plaintiff with warranty, and the plaintiff had re-sold with warranty to one Dowling. Dowling sued the plaintiff, and recovered the price of the horse with £88 costs. The plaintiff had given the defendant notice of Dowling's action. This action was brought for the price of the horse and the costs, and the plaintiff had a verdict for the whole amount. On a motion for a new trial, and to set aside the verdict as to the costs of Dowling's action, it was urged that, if the horse was unsound, the plaintiff had incurred this expence needlessly, and in his own wrong. But the rule was refused, the court saying, "that as the plaintiff received no directions from the defendant to give up the cause, the costs were a part of the damages which the plaintiff had sustained."†

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\* *Marshall vs. Gantt*, 15 Ala., 682.

† *Lewis vs. Peake*, 7 Taunt., 152; but it has been since held that notice is not conclusive. The same question was presented in *Wright vs. Chamberlain*, 7 Scott, 598, and it "being found that the plaintiff, before he defended the action brought against him, might have ascertained, by a reasonable examination of the horse, that it was not sound," the court said that the defence was a rash one, and the plaintiff not entitled to charge the defendant "with the costs of such improvident defence." And

We shall see when we come to examine the subject of principal and surety in its more extended aspect, that it has been frequently held that the party, though holding a warranty, defends the suit at his peril, and that, if it appear to have been unnecessarily defended, the expence will be charged on him. The only effect of notice is to shift the burthen of proof. If no notice be given, the warrantee will be held to proof of the propriety of the litigation. If such notice has been given, the original warrantor will be obliged to prove that the expence was unnecessarily incurred.

Where the defendants had sold the plaintiff a picture, warranted to be painted by Claude, but in fact not painted by him; and the plaintiff sold it to a third party with like warranty; and the second vendee sued the plaintiff on the warranty, and recovered damages and costs,—it was held that if the sale was a *bona fide* sale, the plaintiff could recover the costs paid the sub-vendee, and also the costs of his own defence; nothing is said in the case of notice, or the propriety of the litigation.\*

The same questions which we are now considering, are sometimes presented where the warranty, instead of referring to the quality of the article, is one of title. The result of the older English authorities is, that by the law of England there is no warranty of title in the actual contract of sale any more than there is of quality, and so it has recently been held in a case in the Court of Exchequer.† But according to the Roman law,‡ and in France§ and Scotland, and generally in the United States, there is always an implied contract that the vendor has a right to dispose of the subject which he sells. In an action (on the case)|| on the warranty of title implied in the sale of a horse, Blasdale bought the horse of Babcock, but was afterwards sued by Snow, in trover for the animal: he gave notice to the defendant of the suit, and judgment was obtained against him for the value of the horse, with costs. It was held at the

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in *Penley vs. Watts*, 7 Mees. & Wels., 609, this case is spoken of as reconsidering that of *Lewis vs. Peake*.

\* *Pennell vs. Woodburn*, 7 Car. & P., 117.

† *Morley vs. Attenborough*, 3 Exchequer R., 500; where the English cases are examined.

‡ Domat, Book I., Tit. 2, § 2, Art. 8.

§ Code Civil, Ch. 4, § 1, Art. 1608.

|| *Blasdale vs. Babcock*, 1 J. R., 517.

trial that the judgment was strong, but not conclusive evidence of Snow's title, and that if not rebutted, the measure of damages was the amount of the recovery against Blasdale in the other action, (verdict and costs). And this was held right by the Supreme Court of New York.

In an action (of assumpsit) under somewhat different circumstances,\* the plaintiff bought a horse of the defendant for \$55, cash, and another horse valued at \$85, in all \$140; the plaintiff sold the horse to one Milligan, and shortly after, one Gordon replevied the horse of Milligan, and recovered judgment, \$72 32 for damages, and \$33 95 costs, which were paid by Milligan; Milligan, also, paid the costs of his own defence. The plaintiff then settled with Milligan amicably, and claimed of the defendant the original amount paid by him, and also the damages and costs paid by Milligan and repaid by the plaintiff to him. The cause was referred; and the defendant insisted that the measure of damages was the price of the horse, with the interest thereof, deducting his services since the sale to the plaintiff, and that the plaintiff was not entitled to recover the costs and expences in the replevin suit of Gordon. On a motion to set aside the report, the court held that the referees should have allowed the plaintiff the price paid the defendant for the horse, and interest, together with the costs which he became liable to pay Gordon, in the suit brought to establish his title; and the expences paid by Milligan in his own defence were disallowed.

It may be proper to observe that the court here appears to have lost sight of the principle laid down in the cases already cited, that the recovery should be estimated, not by the price paid, but by the real value. If this rule is true in regard to a warranty of soundness, there seems no reason why it should not apply to a warranty of title.

In a case† where the defendant had sold the plaintiff certain merchandise, called in the bill of parcels scarlet cuttings, intended for the China market, which turned out not to be so, Lord Ellenborough held that such a description implied a warranty that they were the article named, and charged that the

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\* *Armstrong vs. Percy*, 5 Wend., 535.

† *Bridge vs. Wain*, 1 Stark., 504.



plaintiff was entitled to recover such a sum as he would have received had the warranty been true with reference to the China market; the value to be recovered being the value which the plaintiff would have received had the defendant faithfully performed his contract.

It has been held in Massachusetts,\* that where a warranty is given that the endorsements on a note are genuine, and they prove to be forged, "the measure of damages will be the difference between the amount of the note and its actual value, whatever that may be." But I apprehend in practice it will be found that, unless the evidence in regard to a note place the solvency of its maker beyond doubt, it is almost impossible to prove its value with any tolerable degree of accuracy.

It has been decided in the same State in an action of assumpsit, brought on a warranty of an endorsement as genuine, that the plaintiff was entitled to recover as part of his damages the costs incurred by him in an unsuccessful suit against the supposed endorser, if the plaintiff commenced the suit in good faith, not knowing that the signature was forged, and gave the warrantor seasonable notice of the pendency of the suit, and requested him to furnish evidence of the genuineness of the signature; and the court held that the rule established in actions for a breach of the covenant of warranty in the conveyance of real estate, must govern the case.†

We have thus far considered the subject without any admixture of fraud. Where that occurs the rights of the parties are altered. If the vendor of a chattel make fraudulent representations in regard to the value of the property, or is otherwise guilty of fraud in making or performing the contract, to the injury of the vendee, the latter has his election of remedies; he

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\* Coolidge *vs.* Brigham, 1 Met., 547.

† Coolidge *vs.* Brigham, 5 Met., 68; Swett *vs.* Patrick, 8 Fairfield, 9. In Alabama, it is held that, in an action by the vendee of personal property against the vendor, upon a warranty of title, a judgment against the vendee, at the instance of a third person, claiming to be the rightful owner, of which suit the vendor had no notice, is not evidence to prove that the title of the latter was defective. But it seems that such judgment is admissible to prove the amount of damages recovered, and is conclusive of the validity of the vendor's title, if it was obtained without fraud or collusion, upon notice given to him of the pendency of the action. And the measure of damages in an action for a breach of a warranty of title on the sale of personal property, cannot exceed the damages sustained by the vendee. Sall *vs.* Light's Ex'rs, 4 A. R., 700.



may stand to his bargain even after he has discovered the fraud, and recover damages on account of it, or he may rescind the contract and recover back what he has paid; or again, he may wait till the vendor bring his action, and then recover the damages he has sustained by the fraudulent act.\*

And in a case of this kind where on a contract to give personal property at specified prices for land, the contract having been part performed, but the land not being conveyed in consequence of the defendants fraud, it was held that the plaintiff, in an action to recover the value of the property delivered by him, was not limited to the prices specified in the contract, but could recover its true value.†

In Louisiana, in an action of restitution brought to rescind the sale of a slave which had been fraudulently warranted sound, the plaintiff was allowed to recover the price paid with interest from the date of sale, and expenses incurred in medical treatment.‡

In the same State, the code provides that when the seller knows of the vice of the thing sold and omits to declare it, an action of restitution may be brought. In such an action brought on account of the vice of running away in a slave, the plaintiff can only recover such damages as would at the time of defendant's refusal to restore the price have indemnified him; that is, the price with interest, the expence of advertising the runaway, and the costs of the act of sale. Counsel fees in the restitutory action cannot be recovered. They are too remote.§

\* 2 Kent's Com., 5th ed., 480. *Weston vs. Downes*, Douglass, 28; *Towers vs. Barrett*, 1 T. R., 183; *Payne vs. Whale*, 7 East, 274; *King vs. Barton*, 7 East, 481; *Cormack vs. Gillis*, id., 480; *Whitney vs. Allaire*, 4 Denio, 554. Vide supra, as to cases in Alabama, 290, note, and also 296.

† *Camp vs. Pulver*, 5 Denio, 48.

‡ *Johnson vs. Johnson*, 2 La. Ann. R., 67. The whole subject of warranties is governed in that State by a provision of the Code, Art. 2482, which applies also to evictions, and the buyer is entitled to recover:

1. "The restitution of the price;
2. "That of the fruits or revenues when he is obliged to return them to the owner who has evicted him;
3. "All the costs occasioned either by the suit in warranty on the part of the buyer, or by that brought by the original plaintiff.

4. "In fine, the damages, where he has suffered any, besides the price that he has paid." But what are the damages? See *Tear vs. Williams*, 2 La. Ann. R., 868.

§ *Stewart vs. Sowles*, 3 La. Ann. R., 464. See, also, *Peterson vs. Burns*, 3 La. Ann. R., 656.

The modern writers of the civil law furnish us with but little assistance on the questions which we have considered in this chapter. Even the masterly treatises of Pothier, and the profound commentary of his favorite author, Molinæus or Dumoulin, on this subject, are rather to be referred to for the purpose of philosophical speculation, than as authorities for our guidance.\* The total diversity of our forms of action, together with the far greater arbitrary discretion exercised in the matter of damages by the civil law and those systems which adhere to its teaching, render its authors on this subject of comparatively little value to us.

The following is one of many instances put by Molinæus: "*Venditor fundi vel domus, recepto pretio, fuit primum in mora tradendi: unde damnatus ad fructus vel mercedes moræ et in id quod extrinsecus emptoris ob eam moram interfuit; quod probatum fuit ascendere ad ducenta, quæ solvit, re tradita, sed postea evincitur et emptor multo magis extrinsecus damnificatur: Utrum in estimatione et interesse evictionis debeant in duplo computari illa ducenta ob præteritam moram non tradendi soluta?*" § 90.

Here beyond the direct loss sustained by the delay, *extrinsic damage* is allowed.

The arbitrary discretion of the tribunal which has cognizance of the cause, is clearly stated by him in the following language: "*Ut si inter mercatores et negotiatores frumentum certo die et loco, puta, tali portu promissum sit, pro tempore et loco prævidebant, contrahentes creditoris interesse et eum alioquin damna passurum, et tamen debitor per moram vel culpam etiam circa dolum malum fefellit. Ipsa enim æquitas et communis commerciorum utilitas et fides hoc casu exigat, non solum estimationem quanti plurimi si qua sit, sed etiam extrinsecum interesse (verumtamen propinquum et efficax præstari) quod etiam jura aperte volunt dum hoc casu faciunt actionem arbitrariam ut videlicet detur judici judicatu arbitrium*

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\* Pothier, "Contrat de Vente," Part II., ch. I., sect. 1, art. 5, § 79, et seq., and sect. 2, art. viii., § 150, et seq.

Pothier's "Contract of Sale," translated by L. S. Cushing. Pothier allows the buyer the expence of the contract, the fees paid to the head landlord, expence of journeys to see the property, waggoners sent to fetch it, § 69 and 70, and the rise in price of the article, even where there has been a subsequent fall, is expressly given by § 76.

*et potestas non solum super principali et estimatione quanti plurimi, quæ videtur pars rei, sed etiam super adjudicatione et taxatione hujus interesse."* § 97.

A large portion of this treatise is occupied with the subject of eviction, of which, as applied to real estate, I have already spoken. The phrase is also used by the civil law, where the title to personal property fails; and here we shall see that the limit of recovery, is not as in regard to land, the price paid, but the value of the article at the time of sale. Molinæus thus discusses the case of eviction of a slave, who, after being long serviceable to the purchaser, is finally taken from him in advanced age, by title paramount; and he well holds that the price would not be the just measure of damage against the seller in such a case. *Tum cum non venderetur res soli nec perpetuo durabilis, sed quæ ultra certum tempus vivere et usui esse non posset, certum est non esse actum nec cogitatum ut frui te habere liceret perpetuo, sed solum ad tempus vitæ, quod verisimiliter prævisum et æstimatum fuit et ad verisimilem durationem majus vel minus definitum pretium. Igitur hoc casu pretium conventum non est pretium perpetuæ durationis, et fruitionis vitæ verisimiliter expensæ et appreciatæ. Cum ergo toto fere tempore vitæ prævisæ fructus sit emptor, nec per evictionem absit nisi modicum et fere inutile tempus, non potest totum pretium repetere cum intus habeat totum fere commodum et fructum prævisæ fruitionis et usus.* § 127.\*

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\* I have gone over Dumoulin's Treatise, *De eo quod interest*, (Caroli Molinæi Opera Omnia, Parisiis, 1681, vol. 8, 428), but without finding much of practical value.

It is a commentary on the code, *De Sententiis quæ pro eo quod interest proferuntur*; Cod: lib. vii., tit. xlvii. The leading clause in which is, *Sancimus itaque in omnibus casibus qui certam habent quantitatem vel naturam, velut in venditionibus et locationibus et omnibus contractibus, hoc quod interest dupli quantitatem minime excedere.*

A great portion of this treatise is now entirely valueless. Thus, no small part of it is occupied with laborious discussions of the true definition of the term *interesse*—*interesse extrinsecum, interesse communis, interesse conventum et non conventum*, § 16; and a variety of questions growing out of the terms of the law commented on; as *quid sit illud simplum ad quod interesse singulare refertur et duplatur; qui sint casus certi et qui incerti.* § 20.

No small portion of it is devoted to refuting other glossators and discutants of similar questions, thus: "*Ex quibus apparet Curt. aliorum scripta neglectum, et perfunctoria transcurrisse, et novam hanc opinionem ex capite proprio fabricasse;*" § 28; and again, "*Jacobus, autem, Renal, in suo confusaneo de his tractatib. jactat se novam opinionem affere, sed inani proluxæ ineptæ verborum fumo, nihil enim prorsus novi adfert, sed post multam inanem elocutionem in Bart: et communem opinionem esse revolvit, et nihil addit nisi quod confusionem auget.*" § 29.

HUBERUS, another very eminent master of the modern civil law, after defining Damages according to the Civil Law, to be nothing other than the profit lost, or the injury sustained, "*æstimatio damni illati et lucri cessantis*," declares the subject to be controlled by these three rules: *First*, that taken from the Code which we have elsewhere considered, that in regard to things certain, the compensation shall not exceed the *double*. *Second*, that the direct, and not the remote results are to be accounted for, subject, however, to the provision that, in cases of fraud, all damage sustained is to be made good; and *Third*, that in estimating injury, the general opinion, or in regard to things vendible the market value, and not the particular estimate of the injured party is to govern. But it is doing injustice to the clear brevity of the original to attempt a translation.—I. *In casibus certis, ubi de speciebus vel quantitativibus definitis agitur, non potest excedere duplum: l. un. C. de Sent. quæ pro eo quod int.* II. *Lucrum oportet circa rem ipsam consistat, in eaque sit radicatum, ut D.D. loquatur, non foris advenians aut fortuitum: l. 21, § 3, de act. empt. Detrimenta tamen omnia præstantur si dolus intervenierit; aliter quant minoris: l. 13, pr. d. t. de act. empt., l. 19, § 1, locati.* III. *Lucri et damni ratio ex judicio communi, non affectione peculiari initur; nam hæc in phantasia hominum consistit, cujus æstimatio nulla est: l. 33, ad L. Aquil.\**

He then proceeds to illustrate these rules. A party who had

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It contains, also, much discussion on the subject of evictions, of the *stipulatio dupla*, and the remote damages due in case of negligence. It is curious throughout, replete with the learning of that age, and with a vigor and subtlety which would do credit to any age, but of little practical utility to us.

No one can fail, in turning to the treatises of the great masters of the civil law, to perceive how much they are benefited by the superior harmony and logic of their system. Unembarrassed by any conflict of legal and equitable jurisdictions, unperplexed by forms of action, relieved from a great portion of our distinctions between real and personal property, and thus emancipated from a multitude of futile technicalities which have no bearing whatever on the rights of parties, their discussions have a clearness, an order, and a scientific precision, that it is in vain to hope for under our incongruous system.

But on the other hand we are not without compensation. We search in vain in the pages of these writers, for the accurate practical teaching of our law; and we sadly miss the sharp analysis of actually occurring cases, which gives so much interest and value to the great body of our jurisprudence, making it, instead of a mere repository of theoretical discussions, a faithful portraiture of the actual wants, interests, and passions of mankind.

\* Huber. Præl. Jur., I., 405, § 17.

let a certain pottery to another was unable to perform his agreement. The hirer proved that he could have made in a year (the term is not stated), a thousand florins, and recovered that amount. But, says the author, he should only have had judgment for 300 florins, because the annual rent of the farm was 150 florins :—*Quod erat simplum, et contractus locationis est certus, id est certæ quantitatis ; tales autem duplum egredi non possunt : quæ regula.* exclaims Huberus, *incredibile est quam vulgo ignota visa est !\**

In illustration of the second rule, he states this case : Hypolytus ab Arssen had purchased certain turf pits, with an agreement that the seller should give him the right of way through a certain ditch, requisite to remove his turfs. After the sale, however, the purchaser found that the seller had intentionally (*per dolum*), left a strip of earth between him and the ditch, so that he could not use it. The plaintiff proved that at the time of the obstruction he could daily make forty florins ; but that afterwards prices had fallen to 20 florins, at which he had been obliged to sell his turf. *Condemnatus est venditor in id quod emptoris interesset.* *Cum ad taxationem ejus quod interest preventum esset*, the plaintiff claimed this sum, viz., the price at 40 florins, which greatly exceeded twice the purchase money of the whole land. But for the defence it was contended, 1. That the alleged price of turf was extraordinary. 2. The injury was not sufficiently direct, for the plaintiff might have gone round through the land of other parties, or he could have thrown a bridge over the obstacle, and thus transported his turf. 3. That the buyer had an offer of 32 florins, which he had refused ; and that consequently the seller was not liable, unless perhaps for the expense of the bridge that the buyer might have made, and the transportation of the turf over it. Huberus thus answers these arguments : 1. The price was the common one, and at all events the objection was inadmissible in a case like this of fraud.—*Præterea per dolum hic prætextus excludebatur.* 2. The objection came too late, because the seller was already condemned to respond in damages. As to the bridge, it was not to be required that this idea should have suggested itself to the buyer, nor was he bound to resort to such an expedient in case of fraud.

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\* Vol. III., 88.

3. The buyer was not bound to receive 32 florins for his turf at a time when he could sell them for 40. But the cause was decided on the basis of the offer of 32 florins; and Huberus seems to deplore the arbitrary control exercised by the courts over the subject of compensation. "*Quanquam juris igitur rationes, pro triumphante (the plaintiff) militare viderentur, tamen ut est hujus rei praxis valde lubrica et tantum non arbitraria, factum est ut venditor viz ultra quam obtulerat sit condemnatus.*"\*

It might be curious, if our space permitted, to compare the decision here made with what it would be in a similar case, say a conveyance with a covenant of right of way, according to our jurisprudence.

Among the more recent writers on the modern civil law, we find the same absence of any definite rule of which I have already complained.

Domat says,† the seller who fails to deliver, must pay the damages caused by his default, according to the circumstances of the case. Thus, he who contracts to deliver any article of merchandise, the price of which rises at the time and place fixed for delivery, must pay the actual value at such time and place, as well on account of the profit that the purchaser would have made by re-selling them there, as on account of the loss that he sustains, by being obliged to purchase other articles at a price exceeding that of his bargain.

So, he says that the purchaser would be entitled to his expenses actually incurred on coming to receive the article which was to have been delivered; but that remote and unforeseen consequences are not to be taken into consideration. Thus, for instance, if the seller, failing to deliver the commodity at the time and place fixed on, the purchaser has been unable to

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\* Huberus Præl. Juris., Vol. III., 88 et 89, § 80 to 85.

† Contrat de Vente, Loix Civiles, Liv. 1, tit. 2, sec. 2, § 27. "Le vendeur qui est en demeure de delivrer, doit les dommages et intérêts qu' aura causés le retardement selon l'état des choses et les circonstances. \* \* Ainsi celui qui devoit delivrer a un certain jour, dans un certain lieu, du bled, du vin, et d'autres denrées donc le prix se trouve augmenté au jour et au lieu où la delivrance devoit être faite, doit à l'acheteur la valeur presente du jour et du lieu, pour le profit qu'il aurait fait en les y revendant, ou pour le perte qu'il souffre si pour son usage il est obligé d'en acheter d'autres a ce prix qui excède celui de la vente." Troplong, in his masterly treatise *De la Vente*, complains of the looseness of Domat on the subject of the measure of damages; but the difficulty appears to me rather to be in the system than in the author.

transport them to another place, where he could sell them at an advance; or, if, by reason of the non-delivery of the article, he has been obliged to send off his workmen, and to stop some work of which the cessation causes him considerable injury,—the seller will not be considered liable, neither for the profit lost, nor the injury sustained, for these consequences are not to be imputed to the default of delivery, but result from the arrangements of a higher power, and accidental circumstances which no one can control.\*

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\* Cont. de Vente, Liv. I., tit. 2, sec. 2, § 18: "Dans le même cas la dépense qu'aurait faite l'acheteur, pour venir recevoir et pour transporter les grains achetés, et les autres suites immédiates qu'on doit naturellement attendre du retardement. Mais on ne doit pas étendre les dommages et intérêts aux suites plus éloignées et imprévues, qui sont plutôt un effet extraordinaire de quelque événement et de quelque conjoncture que fait naître l'ordre divin, que du retardement de la délivrance. Ainsi, par exemple, si le vendeur ne délivrant pas au jour et au lieu des grains qu'il a vendus, l'acheteur a manqué, par le défaut de la délivrance, de faire un transport et un commerce de ces grains dans un autre lieu où il aurait pu les vendre encore plus cher que dans le lieu où la délivrance devoit être faite, ou si, faute d'avoir ces grains, il a été obligé de renvoyer des ouvriers, et de faire cesser un ouvrage dont l'interruption lui cause un dommage considérable, le vendeur ne sera tenu, ni de ce gain manqué ni de ce dommage incouru, qui ne sont pas tant des suites qu'on puisse imputer au retardement de la délivrance, que des effets de l'ordre divin, et des cas fortuits dont personne ne doit répondre."



## CHAPTER XI.

### THE MEASURE OF DAMAGES IN ACTIONS GROWING OUT OF THE CONTRACT OF PRINCIPAL AND SURETY.

Various contracts of suretyship—Rights resulting from implied promise—Express promise to do a particular act—Express promise to indemnify and save harmless—As a general rule, the surety cannot make any claim against his principal until he has actually paid the debt—Exception where the party contracts to do a particular thing—The measure of damages as affected by the mode of payment—when made in land or property other than money—when in securities—What expences or costs the surety can recover against the principal—Measure of damages as between surety and co-surety—as between lessee and sub-lessee.

THE contract of suretyship is one of very frequent occurrence, arising sometimes by implication of law, as between the parties to negotiable paper, or debtors and their bail; at others created by express agreements of guarantee. These again sometimes take the form of indemnities and contracts to save harmless, and at others assume the more binding shape of express contracts to do the particular thing in question; in which last case, indeed, the peculiar relation of principal and surety often ceases to exist.\*

The questions that present themselves, as between the principal debtor and the party who has assumed for him the obligations of a surety, relate to the circumstances which entitle the latter to call for re-payment of any sum he may have been obliged to pay for him; the mode of that payment; and the collateral expenses, legal or otherwise, of which he can demand reimbursement.

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\* "In ancient times," said Buller, J., in *Toussaint vs. Martinant*, 2 T. R., 100, "no action could be maintained *at law*, where a surety had paid the debt of his principal. Now, why does the law raise such a promise? because there is no security given by the party. But if the party choose to take a security, there is no occasion for the law to raise a promise."



These questions are sometimes presented in actions by sureties against their principals, sometimes in suits against the sureties themselves; and though the law generally tends to favor the surety, still, so far as the construction of the contract is concerned, no difference is made as to the manner in which the case is presented.

There is another class of cases of a mixed character, where actions are brought against sureties for sheriffs, constables, or other public officers. As these cases involve as well the duty of the principal as the contract of the surety, we shall defer their consideration till we come to examine actions against public officers.\* We shall for the present confine ourselves to the liabilities of principal and surety as arising out of private contract.

Let us first bear in mind the clear distinction that exists between two classes of cases, falling under the general head. "It is the distinction between an affirmative covenant for a specific thing; and one of indemnity against damage by reason of the non-performance of the thing specified. The object of both may be to save the covenantee from damages, but their legal consequences are essentially different."†

It is a general rule that a surety for the payment of money cannot call on his principal until he has paid the debt. So it was early held by Lord Mansfield, in regard to a surety in a bond; "till damnified," said his lordship, "which he could not be till he had been called upon and had paid, he could not bring an action."‡ And so it has been held in New York, where the surety had been sued and charged in execution, that not having paid the debt, and having no promise to indemnify him, he could not recover against his principal.§ For this a technical reason also exists; the only action that can be maintained in such case is assumpsit for money paid, which, of course, will not lie until money or its equivalent is paid.

Where, however, the surety holds an express promise to indemnify and save him harmless, there he can maintain an action without having paid the debt; and we shall presently examine

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\* Post, Ch. XXI.

† Gilbert *vs.* Wiman, 1 Comstock, 550.

‡ Taylor *vs.* Mills, Cowp., 525. Paul *vs.* Jones, 1 T. R., 599. Powell *vs.* Smith, 8 J. R., 249. Rodman *vs.* Hedden, 10 Wend., 498.

§ Powell *vs.* Smith, 8 J. R., 249.

the extent of compensation allowed for the injury he alleges himself to have sustained.\* But where the plaintiff holds not merely an agreement to indemnify and save him harmless against the consequences of the default of the other, but an express promise to pay a debt, or to do some particular act, then the position of the parties entirely changes, the relation of principal and surety disappears, and it has been held, that the failure to perform the act agreed on gives the plaintiff a right of action, even before he has suffered any direct damage himself; and so it has also been decided as a rule of pleading.

Where the defendant agrees to discharge the plaintiff from any bond or other particular thing, there the defendant, having agreed to do a particular act, cannot plead *non damnificatus*; but where the condition is to discharge the plaintiff from damage by reason of any particular thing, or to *indemnify and save harmless*, there the damage must be shown, and consequently *non damnificatus* is a good plea.†

So in New-York, where the plaintiff as lessee of a term of years had assigned it to the defendant, who executed a covenant to pay the rent to the head landlord, it was insisted on the part of the defendant, that the plaintiff could only recover nominal damages, unless he showed that he had paid the rent; but the court said, "the covenant is express and positive that the defendant will pay the rent, and it would be against all reason and justice to say that the plaintiff shall himself pay and advance the money before his right of action against the defendant to recover it arises;" and the rent was held to be the measure of damages.‡

So again in the same State, if one, by bond, guarantees that a third party shall pay a certain sum of money by a given day, on demand, the plaintiff must assign the non-payment of the

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\* *Rodman vs. Hedden*, 10 Wend., 498. The bail of the deputy Sheriff are not liable unless the Sheriff has been damnified or made legally liable in consequence of the dereliction of the deputy. *Hughes vs. Smith*, 5 John., 168. *Rowe vs. Richardson*, 5 Barb. S. C. R., 385.

† *Cutler vs. Southern*, 1 Saund., 116, n. 1. *Holmes vs. Rhodes*, 1 Bos. & Pul., 638. *Hodgson vs. Bell*, 7 T. R., 97. *Port vs. Jackson*, 17 J. R., 289. S. C. affirmed in Error, ib., 479. *Thomas vs. Allen*, 1 Hill, 145. These two last cases overrule that of *Douglas vs. Clarke*, 14 J. R., 177.

‡ *Port vs. Jackson*, 17 J. R., 289. S. C. in Error, ib., 479. See *Toussaint vs. Martinant*, 2 T. R., 100. *Martin vs. Court*, 2 T. R., 640. *Hodgson vs. Bell*, 7 T. R., 97. *Atkinson vs. Coatsworth*, 8 Mod., 38.

money by the third party as a breach of the condition of the bond sued on, but he is not bound to give any further evidence of the extent of his damages, the instrument itself fixing the amount he is entitled to recover; and it was so held against the defendant, who insisted that, in the absence of such evidence, the plaintiff could only recover nominal damages.\*

And a similar decision has been recently made in the English Exchequer.† The defendant was indebted to H. D. and G. B. in the sum of £400, secured by a promissory note made by the defendant, and by the plaintiff as the defendant's surety; and thereupon the defendant covenanted that he *would pay H. D. and G. B.*, the sum of £400, on or before the thirteenth of August then next; breach, non-payment by the day. On the trial it appeared that the plaintiff had been notified that he would be held liable on the note; but the note was not paid, and the defendant insisted that the plaintiff was only entitled to nominal damages. The Lord Chief Baron Abinger overruled the objection; and the plaintiff had a verdict for the note and interest. On showing cause why there should not be a new trial, this was held right: Alderson, B., said, "To what extent has the plaintiff been injured by the defendant's default? Certainly to the amount of the money that the defendant ought to have paid according to his covenant;" and he likened it to an action of trover for title deeds.‡

But I am obliged to say that these decisions appear to me somewhat to conflict with the important and fundamental rule which has been already stated, that actual compensation will not be given for merely probable loss.§ Nor is the argument that the party having bound himself to do a particular act must therefore be held liable in the full amount, of greater weight. There is a multitude of contracts of the same character, to which no such doctrine is applied. If, instead of a contract to pay a certain sum of money, the agreement be to do

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\* Mann *vs.* Eckford's Ex'rs, 15 Wend., 502. Ex parte Negus, 7 Wend., 499.

† Loosemore *vs.* Radford, 9 Mees. & Wels., 657.

‡ Upon the analogy of these decisions the case is probably to be upheld which I have elsewhere cited, where it was decided that in an action brought on a covenant to discharge an existing incumbrance, the plaintiff was entitled to recover the full amount of the incumbrance, though nothing had been paid. Lethbridge *vs.* Mytton, 2 B. & Ad., 772. Supra, 190.

§ Supra, 58 and 282.

any other particular act, an inquiry is indispensable to ascertain how far the party plaintiff has been damnified by the nonfeasance. It is perhaps no great stretch of reasoning to say that the damages arising from the non-payment of money should be measured by the sum itself. Still, a doubt may often arise whether the *party who holds the agreement* has been injured to that extent; and this is well pointed out by a very accurate judge, in the case last cited. Parke, B., said, "The defendant may perhaps have an *equity*, that the money he may pay to the plaintiff shall be applied in discharge of his debt; but, *at law*, the plaintiff is entitled to be placed in the same situation, under this agreement, as if he had paid the money to the payees of the bill." This remark of a very acute judge, states the evil but suggests no remedy. The law is thus carried into execution unattended by the equity which should temper it. It is only one of many instances illustrating the inconvenience and serious hardships that often flow from the separation of the jurisdictions. Either the plaintiff should only be allowed to recover for actual loss; or if the court proceed upon the idea of compelling the defendant specifically to perform his promise, it should carry the engagement into full execution, by applying the proceeds of the judgment where they belong. This a court of law possesses no power to do; and as it is incompetent to do complete justice, it should confine its remedies exclusively to those cases where actual injury appeals for redress.

Any rule by which actual damages are given where no actual loss is sustained, is in truth nothing but an effort to engraft on the courts of common law a species of specific performance, irregular and illegitimate; and which neither their forms of procedure, nor the general arrangement of their system, enable them to exercise without great danger of injustice and abuse. The rule should be considered cardinal and absolute, that actual compensation shall only be given for actual loss.

It appears, upon the whole, settled, that if the engagement be collateral, or more properly speaking indirect, whether only implied in law, or whether it be an undertaking to indemnify and save harmless against the consequences of the default, there damage to be recovered must be proved. And so it is held, whether the action be by the surety against the principal, or by

the creditor against the surety. In a case at Nisi Prius before Lord Ellenborough, on a bond conditioned to indemnify the plaintiff against a bond given by him to a third party, though it did not appear that he had paid it, his lordship said that he did not see any measure of damages except the penalty of the bond; and the jury so found.\* But this is not the result of the more recent authorities of the courts in this country. In an early case, the question, "whether on an escape the bail to the liberties became liable for the whole penalty, or for the damages sustained by the sheriff by reason of the escape," was raised in New York, but not decided.† But it was soon after said that neither the sheriff nor his assignee could recover without showing injury sustained, and that consequently, recapture after the escape, or a voluntary return, was an answer to a suit against the sureties for the liberties.‡

The subject has been involved in some doubt by various decisions, which have confounded the right of action with the measure of damages, and both these questions again with that of the evidence necessary to prove the claim. Thus it has been sometimes held that the record of judgment against the surety is conclusive evidence against his principal, and fixes the amount of recovery.

So in an action by the sheriff against the sureties in a bond to the jail liberties, it was held that the sheriff, having given notice to the defendants of the escape-suit against himself, and they having thereupon assumed its defense, this was conclusive evidence that the plaintiff had been damnified to the extent of the judgment.§

So again, in an action by overseers of the poor on an order of bastardy to recover against the putative father the weekly sum directed to be paid for the maintenance of the child, the order was held to be *prima-facie* evidence of the demand, and that it rested with the defendant to show himself exonerated from the payment, in order to avoid the recovery.||

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\* Wood vs. Wade, 2 Starkie, 166.

† Jansen vs. Hilton, 10 J. R., 549.

‡ Barry vs. Mandall, 10 J. R., 563.

§ Kipp vs. Brigham, 6 J. R., 158.

|| Wallsworth vs. Mead, 9 J. R., 367. "A judgment against the person to be indemnified, if fairly obtained, especially if obtained on notice to the warrantor, is ad-

On this subject a few observations may be permitted. A judgment against the surety may, upon the ground of privity, be proper evidence against the principal, and *vice versa*; but it is manifest that the record can only be evidence of the facts which it declares, and that payment is not one of these. The judgment, though perhaps conclusive evidence of the debt being incurred, is no proof whatever that that debt has been paid, or that it ever will be.

In a case in New-York, this erroneous view of the subject was carried to a great length; and it is desirable carefully to notice the decision, and those by which it has been since overruled; for unless we adhere strictly to the principle that actual compensation shall only be awarded for actual loss, we are without any guide whatever in any portion of this branch of the law. Suit was brought\* by the overseers of the poor against the sureties in a bond given by the father of an illegitimate child, before its birth, to save harmless and indemnify the town against all expenses by reason of the child. After the birth, an order was made by two justices, according to the statute, fixing the amount of the defendant's liability. It was insisted that this order was competent evidence against the defendant, and that the town was not bound to show the actual expenditure of the sum claimed; and it was so held by the Court of Errors. Jones, C., said:

"It was urged as the general rule, applicable to contracts of indemnity, that the party who is to be indemnified cannot maintain an action on the contract against the indemnifier until he has been damnified. But that rule does not necessarily, and in all cases, require the actual payment of the damages or expenses incurred to enable the party to sue for and recover the indemnity. When the obligation is to indemnify against damages or expenses, and the obligee has become absolutely bound and liable to pay the expense or damage incurred by the charge, and his demand against his obligor upon the bond of indemnity, by reason of the charge against himself, is reduced to a certainty, it would surely be just and reasonable, and would violate no principle of law,

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missible in a suit against him on his contract of indemnity." *Clark vs. Carrington*, 7 Cranch., 308, 322. "When one is responsible by force of law, or by contract, for the faithful performance of the duty of another, a judgment against that other for a failure in the performance of such duty, if not collusive, is *prima facie* evidence in a suit against the party so responsible for the other." *City of Lowell vs. Parker*, 10 Met., 309. See, also, *Heard vs. Lodge*, 20 Pick., 58. *Train vs. Gould*, 5 Pick., 380. *Foxcroft vs. Nevins*, 4 Greenl., 72. *Hayes vs. Seaver*, 7 Greenl., 237.

\* *Rockfeller vs. Donnelly*, 8 Cowen, 628 and 639.

to permit him to enforce his own demand against his obligor in the first instance, and before he satisfies the charge against himself. It is an operation which avoids circuitry, and essentially subserves the purposes of justice and equity, by enabling him who is entitled to the indemnity to obtain the means to satisfy the charge he has incurred from the party who ought to bear it, and thereby save himself the necessity of an advance and payment out of his own funds and estate, which might be inconvenient and perhaps involve him in serious embarrassments."\* \* \* \* \*

"If there had been no adjudication against the father, assessing the amount he should pay for the indemnification of the plaintiffs, and there had been no admission in pleading of the amount demanded, other evidence might have been necessary to enable the jury to assess the damages; but the plaintiffs might in such case have shown that the father had, with the consent and concurrence of his sureties, agreed to pay a weekly or monthly sum for the maintenance of the child, and on the principle of the case of *Hays vs. Bryant*,† have recovered that sum for their indemnity against the charge; or, as I apprehend, it would have been sufficient for them to show what sum was reasonably necessary for the support of the child, during the time it had been chargeable to them; and for that sum, if the child was shown to have been provided for by their procurement, the jury would have been warranted in giving their verdict. Other cases might be put: the town, for example, may have an establishment upheld by a common fund, or supplied by the contributions of the inhabitants in money or provisions, for the maintenance and support of those who are chargeable to it, and where provision is made for illegitimate children as well as paupers; or the infant may be left with the mother by the overseers of the poor, under some arrangement with her for a reasonable allowance for its support; or expenses may be incurred for its maintenance, which, from want of means, or from forbearance or other causes, remain unpaid. In none of these supposed cases, each of which may occur and is within the scope of probability, would there be an expenditure or actual payment of money; and could it be pretended that in any one of them, the overseers of the poor would be disabled, by that cause, from recovering a reasonable and just compensation for the maintenance of the child? The measure of damages might, in some of these cases, be attended with difficulties, which might sometimes be insuperable; but the right of the plaintiffs to compensation for the use of those who might have a claim upon them for the maintenance of the child, and thus enabling them to satisfy the charge, would be undeniable, and the difficulty of the remedy alone would obstruct it. In the present case the overseers of the poor, to obviate all difficulties on that point, have had the precaution to obtain the further relief provided by the act, in an order of bastardy, by which the weekly contribution of the reputed father, to the overseers for the support of the child, is judicially and conclusively settled and determined. This adjudication was in evidence, and, in my judgment, it was conclusive upon both the father and his sureties, as the rule of damages in the action on the bond."‡

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\* P., 647.

† 1 H. Bl., 253.

‡ The same point was again decided in the *People vs. Corbett*, 8 Wend., 520. But



It will be observed that here the covenant was merely to indemnify and save harmless, and did not reach to the extent of a promise to do the thing in the first place. It is to be noticed, also, that the whole scope of this reasoning is opposed to the general rule that actual compensation will only be given for actual loss, and cannot be supported but on the idea that a court of law is to assume the powers of a court of equity, and compel an imperfect kind of specific performance. If this doctrine were maintained, covenantors against incumbrances would be compelled to pay before the incumbrance was discharged; covenantors for quiet enjoyment would be obliged to pay before eviction; and all parties agreeing to do a specific thing, would be mulcted in the sum equivalent to performance, without any proof whatever that the other party had been injured.

The doctrine of this case is, however, far from being recognized as law. In a subsequent case, in the same State, on a bond "to save harmless and indemnify against all damages, costs, and charges, to which the plaintiff's intestate might be subjected, or *become liable for*," it was said by the Supreme Court, "there is no doubt as to the general proposition that in order to recover on a *mere bond of indemnity*, actual damage must be shown; if the indemnity be against the payment of money, the plaintiff must, in general, prove actual payment, or that which the law considers equivalent to actual payment; but if, the indemnity be not only against actual damage or expense, but also against *any liability* for damages or expenses, then the party need not wait till he has actually paid such damages, but his right of action is complete when he becomes legally liable for them." And on the ground that the bond, before the court, was against *liability*, the plaintiff was allowed to recover."\*

In a very recent case on an agreement to indemnify and save harmless against a certain demand, a judgment having been recovered on the claim in question against the plaintiff, but nothing having been paid thereon, the case of *Rockefeller v.*

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in *Churchill vs. Hunt*, 8 Denio, 321, these decisions are said to rest entirely on the spirit and intent of the statute, "giving these bonds an effect which they would not have at common law; and it is there said to be for the same reason that in a claim against the sheriff on bonds for the jail liberties, it is unnecessary to prove damage. *Kip vs. Brigham*, 7 J. R., 168.

\* *Chace vs. Hinman*, 8 Wend., 452. *Ex parte Negus*, 7 Wend., 499; and *Webb vs. Pond*, 19 Wend., 428.



*Donnelly* was pronounced "a very questionable" one; and judgment was given for the defendant, the Court saying, "This is not an agreement to indemnify against liability, but it is the common case of an agreement to indemnify against the claim or demand of a third person; and before the plaintiff can recover, he must show that he has been damnified; the mere fact that the demand has changed its form by having passed into a judgment, is not enough."\*

In a still more recent case where a bond was given "to save harmless and indemnify the plaintiffs *against their liability* as makers of a certain note, and *to pay or cause to be paid* the said note, it was held that the plaintiffs, though they had not paid the note, and were insolvent, were entitled to recover its amount, under the absolute terms of the covenant; but that the plaintiffs could not recover the costs of a suit against them on the note;—as to these costs, the bond was declared purely to be an agreement to indemnify; and the learned Judge Beardsley, proceeded to say, "Notwithstanding what is said in the case of *Chace v. Hinman* (8 Wend. 452), I must say that I am not aware of any distinction at common law between an indemnity against damage and one against liability, which warrants a recovery on the latter on simply showing the fact of liability. In both, as I think, there must be evidence of actual damage by the payment of money or otherwise."†

Again, on a bond "to save harmless," it was said, "here is no absolute agreement to pay, and no agreement to keep the party clear from liability, but merely to indemnify;" and it was held that in order to recover, damage, and that involuntarily sustained, must be shown. It was intimated, however, that "perhaps after a suit commenced, and notice given to the obligor, and neglect by him to defend, the obligee would be warranted in putting a stop to the costs."‡

In a recent case in New York, the whole subject was recently considered in the Court of Appeals. The covenant was, that the plaintiff should not sustain any damage or molestation by reason of any liability incurred by his deputy. Judgment had been recovered against the plaintiff, but not paid; and it was held

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\* *Aberdeen vs. Blackman*, 6 Hill, 324.

† *Churchill vs. Hunt*, 3 Denio, 321.

‡ *Crippen vs. Thompson*, 6 Barb. S. C. R., 532.

that he was not entitled to recover.\* And the decision of *Churchill v. Hunt*, has been approved of, and its principle affirmed, in the State of New Jersey.†

These decisions replace this branch of the law on its proper basis, and declare the salutary principle, that actual compensation can only be given for positive loss, unless it is evident that the parties have stipulated for a more extensive remuneration. Where the agreement is to pay a specific sum of money, or that a third party shall do it; then the suit becomes a suit in the nature of one for specific performance, the measure of damage is fixed by the mention of the sum, and the only doubt can be whether the plaintiff is the proper party to receive it. Where the agreement is to indemnify against liability, the suit is also in the nature of one for specific performance. Liability is a very different thing from payment; and I submit that the literal object of the covenant is not attained unless the plaintiff may rest on showing mere proof of *liability*, and is relieved from the obligation of proving *damage*. The only way to relieve the plaintiff from being liable to be made to pay the debt, is for the law to see to its extinguishment.‡

Having arrived at the general rule, that the surety cannot proceed against his principal debtor until he has paid the debt, it still remains to be seen what in judgment of law is considered as payment. The suit of the surety against the principal is at common law an action of assumpsit, sometimes special, but frequently on the common counts for money paid for the de-

\* *Gilbert vs. Wiman*, 1 Comstock, 550.

† *Jeffers vs. Johnson*, 1 Zabriskie, 73. In Ohio, see *Ohio Life Ins. and Trust Co. vs. Reeder*, 18 Ohio, 47.

‡ See in Virginia a suit by a sheriff on an indemnity bond against damages on levying an execution upon certain specified property. *Dabney vs. Catlett*, 12 Leigh, 383 and 684. See in the same State, a suit on an indemnity against injury to a mill-dam. *Chapman vs. Ross*, 12 Leigh, 565.

In Vermont, if one promise to indemnify another for all damage, &c., which he shall incur in giving up to the promisor a certain horse, and in bringing a suit against the vendor thereof for fraudulently selling a horse belonging to another, if he fail therein; if the suit is brought, and the plaintiff defeated, the record of the judgment is competent evidence in a suit against the promisor founded on the promise, so far as to show the bringing and failure of the action; and that, though no notice of the bringing of the suit was given to the defendant. But the amount of damages depends on the title to the horse, and as to this the judgment is not evidence. *Lincoln vs. Blanchard*, 17 Verm., 464.

fendant's use; and we now proceed to determine what proofs will satisfy the allegation of payment.\*

It will be perceived at once that this inquiry involves various questions, some of a technical character, and springing from the form of the action, others relating to the substantial rights of the parties. Is the payment of *money* in all cases necessary? Can the surety, by giving his bond or note in payment of the original debt, raise a claim against the principal? Will the transfer of land, whether by mortgage or deed, be treated as payment? and if so, at what value shall it be computed? These, and similar inquiries are often complicated and perplexing.

The rule appears to be well settled in this country, though far from being clear in England, that the giving by the surety of his negotiable, promissory note, which is received not collaterally, but as actual payment of the original debt, will be held to be payment as against the principal debtor, and that the surety may at once proceed against him for the amount of his note; in other words, the note is treated as money. While on the other hand, it is also held that the giving a bond will not have the like effect, and that, until the payment of the bond, the surety has no claim against his principal.

It is also well settled, that an absolute conveyance of the land, by the surety, will be sufficient to raise a claim on his behalf against the principal to its full value, and that it will be treated as money paid for the use of the original debtor. An examination of the decisions will best elucidate these rules.

In an early case in the King's Bench,† an application was made to discharge the defendant from custody on filing com-

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\* "It is an equitable principle of very general application," says Mr. Chancellor Walworth, in *Hunt vs. Amidon*, 4 Hill, 249, "that where one person is in the situation of a mere surety for another, whether he became so by actual contract, or by operation of law, if he is compelled to pay the debt which the other in equity and justice ought to have paid, he is entitled to relief against the other, who was in fact the principal debtor. And when courts of law, a long time since, fell in love with a part of the jurisdiction of the court of Chancery, and substituted the equitable remedy of an action of assumpsit on the common money counts for the more dilatory and expensive proceeding of a bill in equity, in certain cases, they permitted the person thus standing in the situation of surety, who had been compelled to pay money for the principal debtor, to recover it back again from the person who ought to have paid it, in the equitable action as for money paid, laid out, and expended, for his use and benefit."

† *Taylor vs. Higgins*, 8 East, 169.

mon bail; and it appeared that the defendant being indebted to one Creswell, the plaintiff Taylor had given Creswell *a bond* and warrant of attorney, and paid him £7 or £8 of costs; that this security was accepted as payment and satisfaction of the debt; and it was contended that this was the same as if the debt had been paid in money. But Lord Ellenborough said, "There is no pretense for considering the giving this new security as so much *money paid* for the defendant's use;" and the rule to discharge the defendants from custody was made absolute.\*

On the authority of this case the same point has been decided in New York.† The plaintiffs being accommodation indorsers for the defendant, had, on being sued, executed to the holders of the accommodation paper, on the 15th April, 1807, two bonds, one payable in eighteen months and the other in two years, which bonds had not been paid. The plaintiffs, subsequently were discharged under the insolvent act. The judge charged that the two bonds amounted in law to a payment of the notes, but the jury found a verdict for the defendants. On the motion for a new trial, the court said, "The question is whether giving a bond, in discharge of the liability of the plaintiffs, is to be considered as a payment in money. \*

\* An obligation to pay is not the same thing as actual payment. A bond has no analogy to cash. \* \* The technical rule operates with perfect justice in this case; for the bond has not, and never will be paid, as the plaintiffs have since been discharged under the insolvent act; and if the money now demanded was to be recovered, their estate would receive it without ever having given an equivalent." The motion for a new trial was denied.

The rule laid down in this case appears to be the same where a mortgage is given. So where an accommodation indorser gave a mortgage to secure his debt, and subsequently released the equity of redemption, and made a conveyance of the land, the case of *Cumming vs. Hackley* was cited with approbation; and it was held that though the conveyance gave a right of action, the mortgage furnished no basis of claim.‡

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\* No attention appears to have been paid to the payment of the costs. This case was sustained in *Maxwell vs. Jameson*, 2 B. & Ald., 59, noticed more fully hereafter.

† *Cumming et al. vs. Hackley*, 8 Johns. R., 202.

‡ *Ainalie vs. Wilson*, 7 Cow., 662.

A different rule has been adopted, as I have already said, where the payment, if such it can be called, is made by giving a note. Where\* the plaintiff became security for the defendant's subscription to a brewer's benefit club, the club called on the plaintiff, and he gave his note, for the amount of the subscription. On the trial of the cause, it being an action of assumpsit for money paid, and the objection being taken that the giving a note was no payment, Lord Kenyon held, "that the club having consented to take the note from the plaintiffs, it was as payment to them of the money due by the defendant; and so the action was maintainable." It is added, that at the next term a new trial was moved for; but the court agreeing with his lordship, the rule was refused.

This authority was much shaken by a subsequent case.† It was an action for contribution. The plaintiffs and defendants united in a promissory note to Batson & Co.; Maxwell took up the note, by giving his own bond to Batson & Co. for the amount. No money was paid. On this state of facts, Maxwell sued Jameson in *assumpsit for money paid*. Bayley, J., said, "The plaintiff in this case has paid no money. It is said, indeed, that he has given what was equivalent to it, and that it ought to be considered, for this purpose, as money; and so it was held in *Barclay et. al. vs. Gooch*. But in *Taylor vs. Higgins*, the court, having the former case before them, held that the action for money could not be maintained." \* \* "Then, as the authorities differ, it becomes necessary to look to the reason of the thing. *No money has yet come out of the plaintiff's pocket, and non constat that any will*; for if he recover from the defendant in the present action, still it is possible that he may never pay it over to Batson & Co. The period of time at which his remedy against the defendant shall commence has not yet arrived. If hereafter he is compelled to pay the money due upon the bond, he may then have his remedy against Jameson for the contribution." Abbott, J., said, "That even supposing, what might be doubtful, that the plaintiff had entirely

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\* *Barclay et al. vs. Gooch*, 2 Esp. N. P. Cases, 571. This case was referred to by the court, in *Taylor vs. Higgins* (8 East, 169), already cited; but Lord Ellenborough did not commit himself to the correctness of the decision. "*Supposing even*," he says, "the case of the note of hand or bill of exchange, as the current representative of money, to have been rightly decided, still," &c.

† *Maxwell vs. Jameson*, 2 B. & Ald., 51.

relieved the defendant from the demand which Batson & Co. had against him, still the case of *Taylor vs. Higgins* is conclusive." Holroyd, J., said, "In order to support this action, the debt must have been extinguished, either by an actual or a virtual payment of money by the plaintiff to the defendant's use. There has clearly been no actual payment; and in order to have made the giving of the bond operate as a virtual payment, the defendant must be shown to have been a party to the transaction, which was not the case."

These cases leave the rule in England in a very unsettled state. In this country, however, the original decision of *Barclay vs. Gooch* has been followed, both in New York and Massachusetts. In a case already cited,\* the case of *Barclay vs. Gooch* was referred to by the Supreme Court of New York, with a qualified approbation. "There are some cases," they say, "in which the giving negotiable paper has been held equivalent to the payment of money; and there may be some reason for this distinction (*i. e.*, between bonds and notes), for otherwise a party may be obliged to pay a debt twice, if the paper should pass into the hands of an innocent indorsee."

The precise point came up subsequently for adjudication in an action of assumpsit for money paid.† The plaintiff became surety for the defendants in a promissory note to one Vanderlyn, on which judgment was recovered. The plaintiff thereupon gave his negotiable note for the amount of the judgment. This had been accepted by Vanderlyn in full satisfaction, but it remained unpaid. The judge having charged in favor of the plaintiff's right to recover, and a verdict being obtained, a motion was made for a new trial. But the court after approving the decision in *Cumming vs. Hackley*, as to a bond, said :

"There are cases in which negotiable paper has been held equivalent to the payment of money, to which it is in some measure analogous, as when the note has been negotiated, and is in the hands of an innocent indorsee. He of course would be protected; and unless it was considered as a payment of the original debt, the drawer might be made to pay twice. So when the note has been accepted and paid in satisfaction of the debt. The note in this case has not been negotiated; but has been accepted and received by the party in whose favor the judgment was obtained, in satisfaction of the debt, which is sufficient

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\* *Cumming vs. Hackley*, 8 J. R., 202.

† *Wetherby vs. Mann et al.*, 11 J. R., 518.

to authorize this recovery. \* \* The defendant has received the full benefit, the debt has been satisfied; and as to him, it is the same as if so much money had been paid for him.”\*

In a recent case,† which came up on error from the New York Common Pleas, Hedden, the plaintiff below, by way of accommodation for Rodman, indorsed a note, on the 30th of August, 1819, for \$118, payable in 60 days. In July, 1820, a judgment was obtained against Hedden, as indorser, by one Jacot: in October, 1820, Hedden paid \$20 on account of this judgment—on the 26th of May, 1821, \$100 more, and gave his note for \$28 10, which was accepted by Jacot in full payment and satisfaction of the judgment. The note for \$28 10 was paid by Hedden on the 28th of July, 1821, previous to which (on the 25th of July, 1821), Rodman had left the State of New York, and did not return till 1830, when the suit was brought. The note for \$28 10 was thus given and accepted in satisfaction *before* the defendant Rodman left the State, but not paid till *after* his departure. The defendant set up the statute of limitations, insisting that the plaintiff's cause of action accrued when the original notes made by Rodman with Hedden's indorsement came to maturity, and that, as the defendant was then in the State, the statute had attached, and the claim was consequently barred. This defense was unsuccessful in the Common Pleas, and the plaintiff had a verdict and judgment, to reverse which, error was brought. After argument, it was said:

“If the giving the note for \$28 10, under the circumstances of this case, can be considered as so much money paid by Hedden for Rodman, then the whole cause of action was complete on the 26th of May, 1821, when the note was given, which was two months before Rodman left the State. The statute having, in that event, commenced running before Rodman's departure, as to the whole cause of action, and more than six years having elapsed before the commencement of this suit, the whole cause of action is barred by the statute.” And after citing the cases we have already considered: “We understand from the testimony, that the note was not only given by Hedden, but was also actually received in full satisfaction and discharge of the judgment. It was, therefore, upon the authority of the preceding cases, equivalent to money paid for the use of Rodman from the moment of its delivery; and this having been two months before Rodman left the State, the whole of the plaintiff's cause of

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\* See, also, *Beardsley vs. Root*, 11 J. R., 464.

† *Rodman vs. Hedden*, 10 Wend., 498.



action was then complete; and the judge should have charged the jury that, upon the issue of the statute of limitations, the defendant was entitled to their verdict."

And the judgment was reversed.\* So where agreements had been given by the defendants as principals, to pay or save harmless; and the plaintiffs as sureties, after verdict, had given their negotiable note for the debt and costs, it was held that the verdict was evidence against the principals though without notice, and that the negotiable note given and accepted in full satisfaction and discharge, was equivalent to the payment of cash; the Court adding,—“so it would now probably be holden of a note not negotiable.”†

The rule appears to be the same in Massachusetts. Where a promissory note was made at the request of the defendant by a third party, payable to the plaintiff, and endorsed by him, and discounted at a bank for the use and benefit of the defendant, the plaintiff paid the note to the bank by giving a new note made by himself, and indorsed by another party. The English and New-York cases were reviewed, and it was held that the giving the new note was equivalent to a payment of the first, and would support an action for money paid.‡

So again it has been held there,§ that a surety who gives his own note for the debt of the principal, which is accepted as full payment by the creditor, and the principal discharged, may treat the note as money paid, and maintain an action of assumpsit thereon.

It is to be borne in mind, however, in all these cases, that it is essential that the note should be given, and accepted by the creditor as full payment and in complete satisfaction. This has been repeatedly decided.

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\* This is a hard case, and evinces a determination to carry the rule to its greatest extent. And it is to be noticed that the judgment was reversed on a ground that by the report does not appear to have been taken at all at the trial. The defendant there insisted that the plaintiff's cause of action accrued when the original notes set forth in the declaration came to maturity; *i. e.* Nov., 1819, and April, 1820. The Court, however, disregarding this line of defense, decided that the cause of action accrued on the acceptance of the note by Jacot, *i. e.* 26th of May, 1821, which point does not appear to have been raised below.

† *Lee vs. Clark*, 1 Hill, 56.

‡ *Cornwall vs. Gould*, 4 Pick., 444.

§ *Doolittle vs. Dwight*, 2 Met., 561.



So where an action of covenant was brought\* by plaintiffs, who had sold the defendants certain coal mines, for which they covenanted to pay a sum certain in instalments, the defendants pleaded payment of part, and a bill of exchange given for *payment and in satisfaction* of the residue on which judgment had been recovered. To this plea the plaintiff demurred; and it was held bad, because it was not averred that *the bill was accepted in satisfaction, nor that it had produced it*; that, not having been accepted as satisfaction for the debt, the bill could only operate as a collateral security, and that therefore the plaintiff might resort to his original remedy on the covenant; and, said Le Blanc, J.: "The giving of another security, which in itself would not operate as an extinguishment of the original one, cannot operate as such by being pursued to judgment, unless it produce the fruit of a judgment."

The principle of this case has been repeatedly recognized in New-York,† where it is held, "that a note is not payment of a precedent debt, unless there is an express agreement to receive it as payment."‡

In a recent case in New-York§ the doctrine that negotiable notes are to be considered as money, has been restricted to cases where the notes have been parted with to *bona fide* holders for value. The plaintiff, Reed, bought of the defendants a thrashing-machine, and gave three negotiable notes of \$200 each for the purchase money. The machine proving worthless, the plaintiff brought an action for *money paid* against the de-

\* Drake *vs.* Mitchell and others, 8 East, 251.

† Witherby *vs.* Mann et al., 11 J. R., 518; Tobey *vs.* Barber, 5 J. R., 68, and Johnson *vs.* Weed et al., 9 J. R., 310.

‡ In Massachusetts it would seem that, in some cases, this express agreement is inferred from the mere fact of giving a negotiable note.

The giving a negotiable note for a debt in a single contract, raises a legal presumption that the note was received in payment, and will operate as a discharge of the single contract, unless the presumption be controlled by evidence of a contrary intent. Thacher *vs.* Dinsmore, 5 Mass., 299. Maneely *vs.* McGee, 6 Mass., 143. Huse *vs.* Alexander, 2 Met., 157. So, also, in that State it is held, in an action by the indorsee against the maker of a negotiable note, indorsed when overdue, a negotiable note made to the defendant by the payee, intended as a payment of the note, may be shown in defense, as a set-off. Holland *vs.* Makepeace, 8 Mass., 418. Sargent *vs.* Southgate, 5 Pick., 312. "A negotiable promissory note, by the common law of this State, is holden to be a discharge of a single contract on which it was founded." Emerson *vs.* Prov. Hat. Mang. Co., 12 Mass., 237.

§ Reed *vs.* Van Ostrand, 1 Wend., 424.

fendants. A verdict was obtained, but it was set aside and a new trial granted. The Court, by Savage, C. J., saying :

" Had the notes in question been given to a third person in payment and discharge of a debt due by the defendants to such third person, then the case would have come within previous decisions. But I cannot find that the giving a note has ever been considered, as between maker and payee, the payment of money by the former to the latter. In my judgment, the mere giving a note cannot be considered payment of the very money for which such note is given as security, so as to justify a recovery of it by the maker against the payee."

In a more recent action, in the same State, where the facts hypothetically put by the Court in the case last cited, were actually presented, the notes having been transferred to a *bona fide* holder for value, the plaintiff was held entitled to recover as for money paid and received.\*

I am constrained to say, upon a review of these authorities, that the English rule, as settled by the case of *Maxwell vs. Jameson*, appears to me to be the sounder one, and more in accordance with the cardinal principle upon which I have already often insisted, that actual compensation shall only be recovered for actual loss.

There is no foundation whatever for any distinction between a note and a bond ; the question turns, or should turn, on the fact of the amount of money actually paid by the surety to relieve his principal. It is no answer to say that the note is treated as money by the original creditor. Relief to the principal obtained by the mere solicitations of the surety would certainly be considered no ground of action ; how does his promise strengthen the claim ? The question is not whether the principal is extricated from his embarrassment, but whether the plaintiff (the surety) has suffered any loss. It could certainly never be tolerated that a notorious and desperate insolvent, as in the case of *Cumming vs. Hackley*, should by any arrangement with the creditor put money in this way in his own pocket ; and an inquiry into the probable payment of the note seems essential, even on the ground that it is in any case to be treated as payment. This, however, raises a new issue completely foreign to the original controversy. It seems to me on the whole, the only

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\* *Colville vs. Besly*, 2 Denio, 189.

safe rule to declare in all cases, that a plaintiff shall not ask a court of justice for redress until he has suffered some actual positive injury ; that the mere apprehension of loss shall in no case be sufficient to entitle him to actual compensation.\*

\* It is proper, however, to notice that the American rule, as applicable to negotiable paper—i. e. that when given by a surety or secondary debtor, and accepted by the creditor in full satisfaction of his demand, it gives at once a right of action against the principal debtor—is also the rule of the civil law.

"La caution," says Pothier, in his *Traité des Obligations*, Part II., Ch. 6, § 7, Art. 1 and 2, ed. of 1781, vol. 1, 212, "a recours contre le débiteur principal après qu'elle a payé. — Il y a même des cas auxquels la caution a action contre le débiteur principal, même avant qu'elle ait payé," and again, "Il n'importe que le paiement ait été un paiement réel, ou une compensation, ou une novation." This term, *novation*, is thus defined by Crivelli—"de novatio, convention nouvelle. On appelle de ce nom, en termes de Droit, le changement d'un contrat en un autre, et par lequel il est dérogé au premier." Dictionnaire du Droit Civil, *in voc.* All the cases which we have just examined in the text, where bonds or notes were given to extinguish prior obligations, would, according to the civil or French law, be novations. "En tous ces cas," continues Pothier, "la caution a droit de demander que le débiteur principal la rembourse, soit de la somme qu'elle a payée, soit de celle qu'elle a compensée, soit de celle qu'elle s'est obligée de payer pour éteindre l'obligation du principal débiteur."

The French code also recognizes the right of the security to proceed against the debtor before payment, and carefully defines the cases in which it is to be exercised. The provisions are as follows :

Art. 2028. "La caution qui a payé a son recours contre le débiteur principal, soit que le cautionnement ait été donné au su ou à l'insu du débiteur. Art. 2032. La caution même avant d'avoir payé peut agir contre le débiteur pour être par lui indemnisée.

"1. Lorsqu'elle est poursuivie en justice pour le paiement.

"2. Lorsque le débiteur a fait faillite ou est en déconfiture.

"3. Lorsque le débiteur s'est obligé de lui rapporter sa décharge dans un certain temps.

"4. Lorsque la dette est devenue exigible par l'échéance du terme sous lequel elle avoit été contractée.

"5. Au bout de dix années, lorsque l'obligation principale n'a point de terme fixe d'échéance, à moins que l'obligation principale, telle qu'une tutèle, ne soit de nature à pouvoir être éteinte avant un temps déterminé."

It is to be borne in mind, however, that the courts of France follow the course of the civil law, and that there is no division of jurisdictions.

The remuneration of *cautions* under the French code is not confined to the mere money paid. 2028. "La caution a aussi recours pour les dommages et intérêts, s'il a lieu."

"L'engagement des débiteurs envers leurs cautions n'est pas compris," says Toullier, "sous la règle (1158) ; car ce n'est pas de l'argent que les débiteurs doivent à leur cautions ; ils doivent les indemniser des dommages qu'elles pourront souffrir de la part du créancier qui n'est pas payé, comme s'il fait saisir leurs biens. Ainsi, l'indemnité que le débiteur doit à sa caution l'oblige, sans qu'il soit besoin de stipulation aux dommages et intérêts qui résulteraient de la saisie et vente des biens de la caution." Toullier, vol. 6, 280, *des Contrats*.

This would not be so with us, as I have already had occasion to say, unless the surety held a contract to indemnify and save him harmless. In the case of a suretyship arising by implication, or without a contract to indemnify, the recovery is limited strictly to the money paid for the use of the principal.

It remains to be seen how far the conveyance or transfer of land furnishes the surety an action against his principal.

In an action of assumpsit for money paid,\* the defendant on the 12th of April, 1817, obtained from the plaintiffs their indorsement on two notes, each for \$2,059 35. The notes were indorsed to John B. Murray & Son, then again indorsed over, and paid by the subsequent indorser. The plaintiffs executed to the Murrays a mortgage on four lots (subject to a previous mortgage for \$1,770), as a security for the indorsements, and subsequently released the equity of redemption to the Murrays, who received the release as payment of \$1,200 on the plaintiffs' indorsement, and discharged them from all further liability as indorsers. Evidence was taken as to the value of the lots, and the jury found for the plaintiffs \$804 45. On a motion for a new trial, it was contended that the conveyance of land would not sustain an action for money paid; but the court, after deciding that under *Cumming vs. Hackley*,† and *Taylor vs. Higgins*,‡ the mortgage was no payment, used this language, as to the release of the equity of redemption: "We have no doubt that as the conveyance of the land was received in discharge of a money debt due from the plaintiff, it is in judgment of law to be considered the same thing as if the plaintiff had actually paid money. The Murrays received it as money, or an equivalent for money. They had the right of electing. To the defendant it was immaterial whether the payment was made in one way or the other." And a new trial was denied.

This case, however, leaves the question open as to the rate at which land under such circumstances is to be taken. The Court say "there is some question whether the equity of redemption, taken subject to the previous mortgage, was equal in value to the 1,200 dollars. The jury found \$804 45 only; and, from the evidence, we think they were warranted in finding that amount." This would seem to imply that the actual, and not the agreed value of the land is to be the guide. Nor does the question appear to have been raised, how far the maker and principal debtor, Wilson, the defendant, was benefited by this transaction. The Court say, that on the conveyance of the land

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\* *Ainslie vs. Wilson*, 7 Cow., 662.

† 8 J. R., 202.

‡ 8 East, 169.

at the agreed valuation of \$1,200, and the release of the plaintiff, Ainslie, "the remainder due on the notes constituted a valid claim in favor of the Murrays, against Wilson, the maker." But is it clear that the claim of the Murrays as against Wilson was good for *only* the remainder? If the Murrays had sued Wilson on the note, what, as between them, would have been the measure of damages? Could in such an action, Wilson have had the benefit of the valuation of the land at \$1,200 to which he was not privy? As between the Murrays and Wilson, was the land satisfaction for any thing more than it was actually worth? What if it had been foreclosed under the first mortgage, and no surplus realized, would Wilson have still had the benefit of the \$1,200 agreement?

In a subsequent case,\* where the plaintiff, an accommodation maker, had paid the defendants' debt, after judgment recovered for \$401 61, by a conveyance of land for a consideration expressed in the deed of \$548 31, it was held, after affirming the main point decided in the last case, that the defendant was at liberty to reduce the amount of the recovery by showing that the land conveyed in satisfaction of the judgment was not of value equal to the amount of the note and interest; and this evidence having been excluded at the circuit, a new trial was ordered.

The same doctrine has been declared in Massachusetts. So under a plea of payment in an action of debt on judgment, the defendant is not confined to evidence of payment in money, but he may show that a chattel or deed of land was given and received in satisfaction of the judgment. He must, however, prove that the thing received was of the full value of the debt, or that it was agreed to be received as such.†

But taking possession of a mortgaged estate for the purpose of foreclosure, does not operate as a payment of the mortgage money; for the land still remains only a security for the money.‡

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\* *Bonney vs. Seeley*, 2 Wend., 481.

† *Howe vs. Mackay*, 5 Pick., 44, and the same rule was laid down in *President of Newburyport Bank vs. Stone*, 18 Pick., 420.

‡ *West vs. Chamberlin*, 8 Pick., 386. In Pennsylvania, the decisions on the subject which we have been considering in this chapter, appear conflicting. In *Pigou vs. French*, 1 Wash. C. C. R., 278, Mr. Justice Washington held that a surety cannot recover the amount for which he has become liable, without showing actual payment before action brought. But where the defendant having guaranteed to keep the plain-

Having thus examined the rules requiring the surety to pay before he proceeds against his principal, and also discussed the questions that present themselves as to the mode of payment, we have now to examine those cases where the surety is obliged to pay under compulsion of law, or where, by reason of his engagement, he is put to indirect or consequential loss.

Where the surety is compelled by suit to pay the debt for which his principal is previously liable, or where a party holding an indemnity against a claim is obliged by legal proceedings to pay the demand in the first instance, it has been frequently decided that he can recover against the principal or indemnitor, not only the amount which he has been obliged to pay, but also his costs incurred in defending the action.

A party who makes or accepts, indorses an accommodation note or bill for the accommodation of a party thereto, is regarded as a surety, and can charge such party with the costs of a suit for the collection of the note which he may have been compelled to pay.\*

So it has been held, as between the accommodation acceptor of a bill and the drawer;† the accommodation indorser of a promissory note, and the maker;‡ as between the indorser of a note compelled to pay, and a party who had agreed to indemnify him on his indorsement.§

We have already had occasion to consider this question in regard to warranties;|| and it would seem that the liability for costs should depend on the grounds of the original litigation,

tiff clear of back interest, failed to do so, it was held that the plaintiff was damnified from the moment judgment was obtained against him, and might sue on the agreement. *Gardner vs. Grove*, 10 S. & R., 187. In another case, however, the court told the jury they were at liberty to find for the whole amount of the plaintiff's liability, but recommended them to find only for the amount actually paid. *Bauer vs. Roth*, 4 Rawle, 88.

\* *Baker vs. Martin Adm'r, &c.*, 8 Barb. S. C. R., 634.

† *Jones vs. Brook*, 4 Taunt., 464.

‡ *Hubbly vs. Brown*, 16 J. R., 70. But an indorser of a regular bill of exchange who has been sued by the indorsee, is not entitled to recover from the acceptor the costs incurred in such action. There is no privity between them. *Dawson vs. Morgan*, 9 Barn. & Cres., 618. *King vs. Phillips*, Peters' C. C., 850. Nor is the maker liable to pay the indorser his costs, if he is sued. "The mere fact of drawing the note does not imply a promise to save the payee harmless from all costs and charges that he may be subjected to as indorser." *Simpson vs. Griffin*, 9 J. R., 181.

§ *Mott vs. Hicks*, 1 Cowen, 618.

|| *Supra*, 298.

and the notice given to the party sought to be charged with the costs. It would certainly be inequitable that a party should be obliged to defray the expense of a controversy, either unnecessary in itself, or which he might not have chosen to incur. "No person," says Lord Chief Justice Denman,\* "has a right to inflame his own account against another, by incurring additional expense in the unrighteous resistance to an action which he cannot defend." In this case the defendant, as lessee of a certain house, had covenanted with his lessor, to put and keep the premises in repair under penalty of forfeiture, and in his assignment to the plaintiff had covenanted that all the covenants had been performed. The covenants had not been performed; the lease had become voidable; and the plaintiff having sub-assigned the lease to one Clark, with a covenant similar to that which he had received from the defendant, was sued by him (Clark), and obliged to pay £120 to settle the demand, together with £119 costs incurred in the defense; and it was held, for the above reason, that these costs could not be recovered over against the defendant. The principle of this decision has been repeatedly affirmed in cases where it has been held that it is not necessary for the surety to stand suit in order to charge his principal. So in New York, where the defendant gave the plaintiff a promise to indemnify him against an act which proved to be a trespass, and the plaintiff being sued for the trespass gave a cognovit, it was held that it satisfactorily appearing that the cognovit was not for too much, he was entitled to recover the amount of the judgment.†

So in Pennsylvania, it has been held that a surety is not bound to subject himself to costs by waiting till the creditor brings suit; but he may consult his own safety, provided it does not involve a wanton sacrifice of the interests of his principal.‡ So again, in the same State it is held that a surety cannot claim reimbursement for expenses unnecessarily incurred.§ This is in analogy also with the sound rule which we have heretofore noticed in regard to real estate—that the vendor who holds a warranty may surrender to a paramount title, thereby only assuming the burden of proof that he did not surrender

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\* *Short vs. Kalloway*, 11 Ad. & Ell., 28.

† *Stone vs. Hooker*, 9 Cow., 154.

‡ *Craig vs. Craig*, 5 Rawle, 191.

§ *Wynn vs. Brooke*, 5 Rawle, 106.



without just cause.\* And a very similar decision has recently been had in England;† it was an action on the case, for running down a ship in consequence of which the plaintiffs were obliged to accept the aid of salvors, and were compelled to pay a large sum of money, and certain costs in addition thereto. It appeared that the plaintiffs, after a negotiation with the salvors, who demanded £150, had tendered £20, and by a decision of the admiralty, were finally obliged to pay £45 damages, and £124 costs. The plaintiffs had a verdict for £45, with liberty to move to increase it by the amount of costs. It was held that it should have been left to the jury to say what a reasonable man would do under similar circumstances; and if the litigation were found to be prudently incurred, then the costs should be allowed; and Parke, B., said, "The parties were in the same situation as if the defendants had entered into a contract with the plaintiffs, not to do the wrong complained of. That is not a contract of indemnity."

But if suit be brought against the surety, and there appear good reason to resist the claim, then the further question arises as to notice. Its effect has been thus stated: "The purpose of giving notice is, not in order to give a ground of action; but if a demand be made, which the person indemnifying is bound to pay, and notice be given to him, and he refuse to defend the action, in consequence of which the person to be indemnified is obliged to pay the demand, that is equivalent to a judgment, and estops the other party from saying that the defendant in the first action was not bound to pay the money." And in this case it was held that notice was not essential, and that the plaintiff could recover his costs though no notice had been given.‡

Its operation has been still more clearly defined by Lord Chief Justice Tenderden, in an action on a breach of the covenant of title: "The only effect of want of notice in such a

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\* So in Massachusetts, it has been said on the subject of eviction, "There is no necessity for the party holding a covenant of warranty to involve himself in a law-suit to defend himself against a title which he is satisfied must ultimately prevail. But he consents at his own peril. If the title to which he has yielded be not good, he must abide the loss; and in a suit against his warrantor, the burden of proof will be on the plaintiff." Parson, C. J., in *Hamilton vs. Cutts*, 4 Mass., 358. *Supra*, 158.

† *Tindall vs. Bell*, 11 Mees. & Wels., 228.

‡ Per Buller, J., in *Duffield vs. Scott*, 8 T. R., 874.



case as this, is to let in the defendants to show that the plaintiff has no claim in respect of the alleged loss, or not to the amount alleged; that he made an improvident bargain, and that the defendant might have obtained better terms, if the opportunity had been given him." This was said in a case where the plaintiff had been obliged after suit to settle with a party claiming under title paramount; and the court said, "As to the costs" (incurred by the plaintiff in defending the action), "the plaintiff here had a right to an indemnity; and he is not indemnified unless he receive the amount of the costs paid by him to his attorney."\* It may, therefore, be said that notice in these cases is not necessary; if given, however, and the defendant neither endeavors to arrest the litigation, nor undertakes to direct it, he will be made responsible for its result; while, on the other hand, the only effect of not giving it, is to throw on the plaintiff the burden of showing that the first suit, the costs of which he claims, was not improperly contested.†

This view of the matter has been very fully stated by Mr. Justice Story, on the Massachusetts Circuit, and applied to the subject of re-insurance;‡ and the Supreme Court of the United States has declared, that a judgment against the person to be indemnified, if fairly obtained, especially if obtained on notice to the warrantor, is admissible, in a suit against him on his contract of indemnity;§ and the law has been similarly declared in New Hampshire, on a suit upon an execution bond.¶

To these general rules an exception was taken by Lord Chancellor Hardwicke as to extents; so in an early case where extent was taken out against a surety to the crown, and after contesting it some time, he paid the claim, and prosecuted his

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\* *Smith vs. Compton*, 8 B. & Adol., 407. Dumoulin considers the question of notice at length, and its effect on the expenses, both in the case when notice is given, and when not given; and when given pending the suit; and as to the motives for not giving: § 150—158.

† Mr. Chitty says, "In cases of guarantee, a notice of the claim and action of the creditor against the surety should always be given to the principal, with an intimation, (if there be clearly no defense), that the action will be settled unless the party forthwith desire that it be defended; and that he will be looked to for indemnity." Chitty on Contracts, 400; on Guaranties and Indemnities, *in notis*.

‡ *N. Y. State Marine Ins. Co. vs. Protection Insurance Co.*, 1 Story, 458.

§ *Clark vs. Carrington*, 7 Cranch, 308, 322.

¶ *French vs. Parish*, 14 N. H. R., 496.

principal for the amount paid by him, including his expenses, it was insisted that the debt being a just one, and improperly disputed, the principal should not be charged with the expense of the litigation; but Lord Hardwicke said: "I know of no such distinction;" and then taking notice that an extent is both an action and an execution, and that the surety could not be supposed prepared to pay the claim immediately, he allowed the demand.\* But, the general rule seems well and clearly established, that the principal shall not be subjected to the expense of unnecessary litigation; how the fact is to be arrived at, and on whom the burden of proof will, as has been said, frequently turn on the question of notice. Where bail employed a third party to find the principal debtor, and then, refusing to pay the expenses of the person so employed, was sued and compelled to pay his bill with costs, it was held in a suit against the principal debtor, that the bail could recover the sum paid, but not the costs; Lord Ellenborough at nisi prius, saying, "As for the costs of the action which the plaintiff took defense to unadvisedly, he should have either defended that action if the demand was unfounded, or paid the money if it could be legally claimed; but having defended that action without foundation, he cannot charge the defendant with the costs incurred in such an improvident defense."†

In a case at nisi prius, where the plaintiff, an auctioneer, was employed by the defendant to sell an estate, and the title proved defective, the purchaser brought suit against the auctioneer for his deposit; the auctioneer gave notice to the defendant, who refused to defend the suit. The auctioneer then paid the deposit, with the purchaser's costs and his own, and brought suit against the defendant, claiming these costs, and the excise duty on the sale. The action was assumpsit for money paid, with the usual money counts; but Lord Ellenborough held, that as to the costs, "there should have been a special count, inasmuch as the right to these costs by the plaintiff was not so apparent. The plaintiff might have defended the action

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\* *Ex parte Marshall*, 1 Atk., 262.

† *Fisher vs. Fallows*, 5 Esp., 171. No action will lie by bail for his trouble or loss of time in taking a journey to become bail, because he does not undertake the journey as such, or labor as a person employed by the defendant, but he does it as a friend, and to do him kindness. *Reason vs. Wirdnam*, 1 Car. & P., 484.

of his own wrong, and without any authority from the defendant. If he had done so, he would not be entitled to call upon his principal to pay the costs, as they were incurred without his consent;" and, on the ground that the declaration should have been special, the costs were refused.\* And in a subsequent case, Lord Tenterten decided, that the accommodation acceptor of a bill, who pays it to a *bona fide* holder after action brought, cannot recover the costs of such suit against a person who, having had the bill delivered to him for a purpose which was satisfied, had improperly indorsed the bill to the holder.† And, where the defendant misapplied the plaintiff's accommodation acceptance, and contrary to his duty indorsed it over for value to a third person, who sued the plaintiff and recovered, it was decided by the English common pleas, that he could not recover the costs of that action against the defendant.‡

In a case on a guaranty to indemnify the plaintiff against the expense of a commission of bankruptcy, the messenger had sued the plaintiff for his bill of six pounds. The plaintiff defended the suit, and claimed sixty pounds costs paid to the messenger in his suit, and also his own costs; but the claim was denied, Lord Tenterden saying: "I think the defendant is not liable for the costs beyond the writ: a man has no right merely because he has an indemnity to defend an action, and put the person guaranteeing to useless expense."§ But, on the other hand, where debt was brought by the plaintiff, as sheriff, against the defendants, on a bond given to the plaintiff as surety to the jail liberties for a debtor in execution, it appeared that the sheriff had given notice to the defendants, and that they assisted in the defense of the suit; it was held in New York that the costs of the suit against the plaintiff were properly recoverable against the defendants.|| The general principles

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\* *Spurrier vs. Elderton*, 5 Esp., 8.

† *Roach vs. Thompson*, 1 Moo. & M., 487. S. C., 4 Car. & P., 194. *Supra*, 248.

‡ *Bleaden vs. Charles*, 7 Bing., 246. The claim to costs was abandoned on the argument. The point was not decided. See this case commented on in *Asprey vs. Levy*, 16 M. & W., 851.

§ *Gillett vs. Rippon*, 1 Moo. & Mal., 406. It is suggested in this case, by Gurney, of counsel for plaintiff, that "notice was given to the defendant, and he might have paid or stopped the action;" but nothing is said of any notice in the statement of the case, which was at nisi prius. See *Freeman's Bank vs. Rollins*, 18 Maine, 208.

|| *Kipp vs. Brigham*, 7 J. R., 168.

which we have been here considering have been applied by Mr. Justice Story to the subject of re-insurance ; and it has been held that the party re-insured is entitled to recover a full indemnity for the entire loss sustained by him, and also for the cost and expenses which he has reasonably and necessarily incurred in order to protect himself and entitle him to a recovery over against the re-assurer. The contestation of the suit, however, must be just and reasonable ; the expenses must be fairly and reasonably incurred ; the conduct of the assurers must be *bona fide*, and in the exercise of a sound discretion ; and as to notice, the learned judge proceeded to say :

“ It is precisely in this view that the consideration of notice of the suit becomes most important, even if it be not (as I am not prepared to say that it is) indispensable. If notice of a suit threatened or pending upon the original policy, be given to the re-assurers, they have a fair opportunity to exercise an election whether to contest or to admit the claim. It is their duty to act upon such notice, when given, within a reasonable time. If they do not disapprove of the contestation of the suit, or authorize the party re-assured to compromise or settle it, they must be deemed to require that it should be carried on ; and thus, by just implication, they are held to indemnify the party re-assured against the costs and expenses reasonably incurred in defending the suit. If they decline to interfere at all, or are silent, they have no right afterwards to insist that the costs and expenses of the suit ought not to be borne by them, as they are exclusively under such circumstances incurred for the benefit of the re-assurers, or are indispensable for the protection of the party re-assured.”

In this case the re-assurers were held liable to pay one half the costs and counsel fees incurred by the assured in the defense of the original suit.\*

The French law peremptorily requires notice, if the surety desire to charge the debtor with his expenses. Its language is clear : “ The surety who has paid, has recourse against the principal debtor, whether he entered into the contract of suretyship, with or without the knowledge of the debtor. And he shall recover the principal, interest, and expenses ; but the surety shall recover only such expenses as are incurred after the principal debtor is notified of the suit against the surety ; and the surety shall also recover damages in a proper case.†

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\* N. Y. State Marine Ins. Co. vs. Protection Ins. Co., 1 Story, 458.

† “ La caution qui a payé, a son recours contre le débiteur principal, soit que le cautionnement ait été donné au su ou à l'insu du débiteur. Ce recours a lieu tant pour

We have now to consider the relative rights and liabilities of co-sureties. The right of action of the surety against a co-surety, or his representatives, arises when the surety pays, and not before.\* And in these cases the surety is entitled to recover against the co-surety, or if more than one against any of them, his aliquot portion of the sum paid. It is not necessary in such case to prove the insolvency either of the principal or of any of the co-sureties. But, on the other hand, the fact of the insolvency of the sureties will not increase the recovery against those who are solvent.†

But where a surety sues a co-surety for contribution for money paid by the plaintiff on account of the principal, it has been held in Alabama that the defendant may show that the surety suing for contribution was indebted to the principal in a larger amount than he was compelled as surety to pay for the principal, and thus defeat the claim for contribution.‡

The question has been examined as to the right of the co-surety to be reimbursed for a proportion of any costs paid by him. In a case at nisi prius between co-sureties for a tax collector, it appeared that the plaintiff had been sued on the principal's default, and judgment had been recovered, and the plaintiff claimed, besides half the verdict against him, half the costs of both parties in the original suit. But Lord Chief Justice Tenterden held at nisi prius, that the defendant was only liable for half the verdict.§ No question was made either as to notice, or the necessity of the suit, nor, would it seem, could any such question properly arise between co-sureties.

But in a more recent case, in the Exchequer, where the plaintiff and defendant had executed, as co-sureties, a warrant of attorney given as a collateral security for a sum of money advanced on mortgage to the principal, and on default being made by the principal, judgment was entered upon the warrant of attorney, and execution issued against the plaintiff, it

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le principal, que pour les intérêts et les frais ; néanmoins la caution n'a de recours que pour les frais par elle faits depuis qu' elle a dénoncé au débiteur principal les poursuites dirigées contre elle. Elle a aussi recours pour les dommages et intérêts, s'il y a lieu."—*Code Civil, Art. 2028.*

\* *Wood vs. Leland*, 1 Met., 387.

† *Cowell vs. Edwards*, 2 Bos. & Pull., 268.

‡ *Bezzell, Adm'r vs. White*, 18 Alaba. N. S., 422.

§ *Knight vs. Hughes*, 3 Car. & P., 467 ; S. C., M. & M., 247.

was held that he was entitled to recover from the defendant, as his co-surety, a moiety of the costs of such execution, Parke, B., saying, "they are costs incurred in a proceeding to recover a debt for which, on default of the principal, both the sureties were jointly liable; and the plaintiff having paid the whole costs, I see no reason why the defendant should not pay his proportion."\*

The same principles which we have been considering, are applied to claims made against sureties; so it has been said, that if one become surety for a debtor, the creditor cannot recover from the surety the costs of a fruitless suit against the debtor unless he give notice of his intention to sue.†

It is perfectly well settled in regard to sureties, in suits against them by the principal creditor, that if there has been no fraud, the apparent inadequacy of the consideration will not exonerate them; and that in case of non-payment by the debtor they become liable for the whole debt, no matter how great the apparent insufficiency of the remuneration they receive.‡

A question has arisen on covenants in leases, as between lessee and sub-lessee, which goes to illustrate the general subject which we are now considering. Elizabeth Coppock demised certain premises to the plaintiff with covenant to repair by lessee; the plaintiff demised the premises to one Finch, for a portion of his own term, with covenant to repair and leave in repair, by lessee. Finch assigned to the defendant, who broke the covenant, by leaving them out of repair at the end of the term. By reason of this, the plaintiff was obliged to pay Elizabeth Coppock, the chief lessor, £10 damages and £100 costs of both sides in the suit brought on the covenant. On the question whether the costs were recoverable by the lessee against the sub-lessee, the Court of the King's Bench held they were, saying, "If the plaintiff could not recover those damages and costs against the defendant, he would be without redress

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\* *Kemp vs. Finden*, 12 Mees. & Wels., 421. A distinction may, perhaps, be taken between costs incurred in a suit, and upon entering up judgment on a warrant of attorney; otherwise these decisions are inconsistent, and if so, I should consider the former the more correct in principle; for, as between the indorser and maker of a note, there is no contract to save harmless, and each surety should stand ready to pay the debt.

† *Baker vs. Garratt*, 3 Bing., 56, per Best, C. J. This was an action against the sheriff for taking insufficient sureties on a replevin bond.

‡ *Oakley vs. Boorman*, 21 Wend., 588

for an injury sustained through the neglect of the defendant, and not in consequence of his own default.”\*

Here it will be seen that there was no covenant to indemnify by the sub-lessee, and on this ground the decision which I have just stated has been overruled by the English Exchequer. Price made a lease to Penley, of certain premises, with covenant that he, Penley, would repair. Penley underlet to Watts, also with covenant to repair; but the covenants were dissimilar. Price sued the plaintiff for breach of covenant to repair, in the original lease. The dilapidations proved were £57 10; in addition to which the plaintiff's costs amounted to £36, and the defendant's to £40. These costs were claimed against Watts. The judge who tried the cause held, that as there was no covenant to indemnify, the defendants in this suit were not liable to costs; and the plaintiffs were allowed to recover only the amount of £57 10, with leave to move to increase it by the amount of costs, £76. On showing cause, this was held right, and Parke, B., said: “If the plaintiffs had desired to be secured against these costs, they might have made themselves safe by taking a covenant of indemnity against any breach of covenant in the original lease; and then they might have recovered these costs.” And after stating that the covenants were dissimilar, he said: “Under the defendants' contract the amount of damages is the damage necessarily sustained by the breach of their own covenant; i. e., the amount necessary to put the premises in the same state and repair in which the defendants ought to have kept them. If the plaintiffs have expended more, that is their own fault, for which the defendants are not liable.”†

We have already considered the general rule by which the surety is denied any remuneration for the remote or indirect consequences of the principal's default.‡

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\* *Neale vs. Wyllie*, 8 B. & Cr., 538.

† *Penley vs. Watts*, 7 Mees. & Welsby, 601. *Walker vs. Hatton*, 10 Mees. & Welsby, 249, affirms this case, and again overrules the case of *Neale vs. Wyllie*.

‡ *Supra*, 76, et seq.



## CHAPTER XII.

### RULE OF DAMAGES AS BETWEEN PRINCIPAL AND AGENT.

**Liability of Agents for nominal Damages**—The measure of Remuneration is a question of law, whether *assumpsit* or *case* be employed—The Agent is charged with the amount of the loss, if he has been guilty of negligence, whether the loss be the direct consequence of his neglect or not—Cases examined—The Agent may show that no loss has resulted—**Liability of Principal to Agent**—Sub-Agents.

THE class of cases which we next proceed to consider, presents some difficulty in regard to the arrangement of the subject, inasmuch as it is impossible in considering it, to adhere closely to any line of division drawn from the forms of action. Demands made by principals against their agents may be either said to arise from the breach of the agent's contract or from the violation of his duty, and the actions of *assumpsit* or *case* can be indifferently used; in the one instance the proceeding being *ex contractu*, and in the other *ex delicto*. But inasmuch as the amount of damages, in the absence of any circumstance of fraud or other species of aggravation, is in either form of action a question of law under the control of the court, I shall consider this branch of our subject, as well as that springing from the liability of common carriers, under the general head of contracts.

In regard to the contract of agency, there is a very interesting class of cases growing out of the liability of the principal for the act of the agent. The rule of the civil law *qui facit per alium facit per se* has been adopted in our law to an extent making the principal in many cases responsible for the negligence or want of skill of the party employed by him. There is also a large class of exceptions where the person though employed by another still carries on a separate and independent calling,



recognized by common usage;\* but these cases rather regard the right of action than the measure of compensation; and so contenting myself with having called the reader's attention to the subject, we turn to that of the rule of damages as between principal and agent where a clear cause of action exists.

It will also be observed that the questions embraced under the head which we are now considering, are very closely connected with another very large class of cases growing out of the relations of master and servant. But to this more particular attention will be drawn hereafter.

In some of the early cases growing out of the contract of agency it seems to have been held, with that disregard of any fixed rule which we have had occasion elsewhere to notice, that the jury had an unlimited control over the amount of compensation; thus, in an action against an attorney for negligence, "the jury were told they might find what damages they pleased."† But according to the more precise and much safer view of the subject now uniformly taken in all cases of tort, where no aggravation is proved, the law fixes the measure of damages; and more especially is this true in those cases which we are now considering, where the action, though it may be shaped so as to be technically, and in form, an action of tort, is in reality in all cases founded on a contract either express or implied.‡

We shall have elsewhere to consider the rule in regard to sheriffs and other public officers, who, in some points of view, are regarded as agents of the party employing them. At present, our subject is the rule of damages where mere private agents have neglected or disobeyed the express or implied instructions of their principals.

The law is perfectly clear, that wherever an agent violates his obligation to his principal, whether by exceeding his authority, by misconduct, or omission, and any damage results to his principal, he is responsible for such injurious consequence, and bound to make indemnity.§

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\* *Laugher vs. Pointer*, 5 B. & Cres., 547. *Quarman vs. Burnett*, 6 Mees. & W., 499. *Rapson vs. Cubitt*, 9 Mees. & W., 710. *Milligan vs. Wedge*, 12 Ad. & Ell., 787. *Martin vs. Temperly*, 4 Q. B., 298. In North Carolina, *Wiswall vs. Brinson*, 10 Ired., 554.

† *Russel vs. Palmer*, 2 Wils., 825.

‡ *Bank of Orange vs. Brown*, 8 Wend., 158.

§ Story on Agency, Chap. VIII.

We have already seen,\* that wherever an engagement is broken, or an obligation violated, the law, in the absence of the proof of actual injury, infers nominal damage to have resulted from it. In regard to agents, however, language has been used from which it might be supposed that this class of cases formed an exception to the general rule, and that unless positive loss were shown to have resulted from the agent's illegal act, no recovery whatever could be had. Thus says Mr. Justice Story: "There must be a real loss or actual damage, and not merely a probable or possible one." And again: "It is a good defense, or rather excuse, that the misconduct of the agent has been followed by no loss or damage whatever to the principal; for then the rule applies, that though it is a wrong it is without any damage; and to maintain an action, both must concur, for *damnum absque injuria* and *injuria absque damno*, are equally objections to any recovery."†

I submit, however, that this language has probably been used with reference rather to the compensation than to the right of action; that no distinction can be taken in this respect between the breach of an agent's engagements and that of any other contract; and that if the inference of nominal damage from any illegal act is correct and logical, it should apply uniformly to all transactions embraced within the wide domains of the law.‡

Assuming, then, that in the absence of proof of positive loss, nominal damage will be inferred, we have to consider those cases where actual injury results, and where, as I have said, the agent is bound to make it good. In applying this rule, we shall find the distinction taken, to which we have already frequently alluded, between proximate and remote damage. The loss for which remuneration is sought, need not be directly caused by the act done or omitted. It will be sufficient if it is a natural or a necessary consequence; but remote or merely possible consequences are excluded from consideration. This principle will be best illustrated by the cases which have been decided.

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\* Supra, 46, et seq.

† Story on Agency, § 222 and 236. See this case cited in *Blot vs. Boiceau*, 3 Comstock, 78.

‡ And so it has been decided in New Hampshire; *Frothingham vs. Everton*, 12 N. H. R., 239. So, also, in *Blot vs. Boiceau*, 3 Comstock, 78.

But it may be stated as a general rule, that in all cases of agency, whether the agent be one of private selection or *virtute officii*, whether factor or sheriff, the omission or misconduct of the agent in regard to the matter with which he is charged or intrusted, renders him liable to the principal in damages; and where he has been appointed to obtain or receive any given sum of money, or security therefor, and it appears that he was guilty of misconduct, and that the money or security was not obtained, these two facts will, in the absence of other proof, be treated as cause and effect. The negligence will be held to be the cause of the loss, and the sum of money in question or the security therefor, will be *prima facie* the measure of damages sustained by the principal.

Evidence, however, that such is not the case, that the negligence was not and could not have been the cause of the loss, or that the real damage is less, will throw the burden of proof back upon the plaintiff, and compel him to show the damage he has actually sustained by the neglect of the agent.

The damage, as I have heretofore had occasion to say,\* must be proximately caused by the act or omission of the agent, but it need not be the direct result of it. Thus, says Mr. J. Story, "If an agent knowingly deposit goods in an improper place, and a fire accidentally ensue, by which they are destroyed, he would be responsible for the loss;" and so the Master of the Rolls said, speaking of trustees, "If the loss had happened by fire, lightning, or any other accident, that would not be an excuse for them if guilty of previous negligence."† In these cases, though the loss is not the immediate consequence of the negligence, but of the fire, still it may be truly said that it would not have occurred except from such negligence.‡ So if an agent, in procuring a policy of insurance, should so negligently execute his duty, as that the risk (for example, a peril of the seas by which a loss was caused) should not be included, although the loss was directly owing to the peril of the seas, still it was proximately owing to the negligence of the agent, and the principal may accordingly recover. These questions

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\* *Supra*, Ch. III., 57.

† Story on Agency, § 218. *Caffray vs. Derby*, 6 Vesey, 488, 495.

‡ See *Williams vs. Littlefield*, 12 Wend., 362.

very frequently arise between merchants and insurance brokers or factors.

So in a case\* where the defendants, in taking out a policy for the plaintiffs, had omitted "a liberty to touch at the Canary Islands," and having touched there, and being captured, the underwriters refused to pay on the ground of deviation, Lord Ellenborough held, that the plaintiffs were entitled to recover a verdict for the sum insured, deducting the premiums. Again, in a case† where the defendant, in effecting a policy, had departed from his instructions, and the vessel being lost, the underwriters, in consequence of the agent's neglect, were not liable, two of the underwriters for £200 having paid the loss, and a third for the same sum having become bankrupt, Gibbs, C. J., held that the plaintiff was entitled to recover the amount directed to be insured, less the £400 paid, and the £200 subscribed by the bankrupt underwriter; and the plaintiff accordingly took a verdict for the balance.‡

In a case in New York, where premiums had been paid at Savannah to an agent of underwriters doing business at New York, and a bill was filed against the company to compel the execution of a policy, Mr. Senator Colden said: "Suppose an action had been brought against the Savannah agent for not sending the premium to New York in due time, can there be a doubt that the appellant would have recovered in a court of law, and that the measure of damages would have been the amount which was to have been insured, and for which the premium was paid?"§

Again, if an agent who is bound to procure insurance for his principal, neglects to procure any, and a loss occurs to his principal from a peril ordinarily insured against, the agent will be bound to pay the principal the full amount of the loss occasioned by his negligence.

In a case on the Pennsylvania circuit,|| the late learned Mr. Justice Washington charged,—

\* *Mallough vs. Barber*, 4 Campb., 150, (1815).

† *Park vs. Hamond*, 4 Camp., 344.

‡ See this case, 6 Taunt., 495, where a new trial was refused, but nothing was said as to the measure of damages.

§ *Perkins vs. Washington Ins. Co.*, 4 Cowen, 645 and 664.

|| *Morris vs. Summerl*, 2 Wash. C. C. R., 208, (1808).

"That in case a merchant is in the habit of effecting insurance for his correspondents, and is directed to make an insurance, and neglects to do so, he is himself answerable for the losses as an insurer, and entitled to a premium as such. That the amount of loss for which an underwriter who had subscribed the policy would have been answerable is the only measure of damages against him. If he can excuse himself for not having effected the insurance, he is answerable for nothing; if he cannot excuse himself, he is answerable for the whole."

And it appears that on exception to the charge this judgment was affirmed in the Supreme Court of the United States.

The same point was laid down in another case by the same able judge,\* still more broadly: "The law is clear, that if a foreign merchant who is in the habit of insuring for his correspondent here, receives an order for making an insurance, and neglects to do so, or does so differently from his orders, or in an insufficient manner, he is answerable not for damages merely, but as if he were himself the underwriter, and he is of course entitled to the premium."

If a bank receive a note for collection in another State, and neither collects it nor gives the owner notice of non-payment, nor returns it till barred by the statute of limitations, and there be no evidence of the insolvency of the maker, the measure of damages is the amount of the note less the charges for collection.†

It has been settled in New York that on the deposit of a bill of exchange with a banker for collection in another State where it was payable, the banker was liable to the holder for any neglect or omission of duty, in respect of such collection, on the part of his agent or the notary employed by him in the foreign State;‡ and on the authority of this case it has also been decided, that where a person undertakes the collection of a bond and mortgage, and covenants in express terms "*to take proper means to collect the mortgage*, he is responsible for the default of the solicitor employed by him, and the amount of the bond and mortgage is the *prima facie* measure of damages."§

In a case in the English Common Pleas,|| the question was

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\* De Tastett vs. Croussillat, 2 Wash. C. C. R., 132.

† Wingate vs. Mechanics' Bank, 10 Barr, 104.

‡ Allen vs. Merchants' Bank, 22 Wend., 215.

§ Hoard vs. Garner, 3 Sandf. S. C. R., 179.

|| Davis vs. Garrett, 6 Bing., 716, (1830).

carefully considered by a very able court. The plaintiff put lime on board the defendant's barge, to be carried from Medway to London; the barge deviated; while out of her course a tempest ensued, in consequence of which the sea communicated with the lime, and by reason of this the barge took fire; the master then, for the safety of himself and crew, ran her on shore; and the result was, that both the vessel and cargo were lost.

It was insisted for the defendants that the deviation was not a sufficiently proximate cause of the loss of the lime to entitle the plaintiff to recover. But a verdict having been given for the plaintiff, on a motion for a new trial, Tindal, C. J., in delivering the opinion of the court, said: "We think the real answer to the objection is, that no wrongdoer shall be allowed to qualify or apportion his own wrong, and that as a loss has actually happened while his wrongful act was in operation and force, and which is attributable to his wrongful act, he cannot set up as an answer to the action, the bare possibility of a loss if his wrongful act had never been done. It might admit of a different construction if he could show, not only that the same loss *might* have happened, but that it *must* have happened, if the act complained of had not been done; but there is no evidence to that extent in the present case." And this reasoning is adopted by Mr. Justice Story in his work on Agency.\*

In Pennsylvania, where a party in London consigned goods to a correspondent in Philadelphia, to be delivered to a third party, only in case of his paying the amount or giving satisfactory security, and the agent delivered the goods without requiring either payment or security,—it was held, that the agent had thereby made himself liable for the full amount of the original debt, with a reasonable compensation for the delay of payment.†

Such, too, is the language of all the most eminent authors of our law. "In this," to use the clear language of Mr. Sergeant Marshall,‡ "as in all other cases where a man, either by an express or implied undertaking, engages to do an act for

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\* Chapter VIII., § 219. See, to S. P., Parker *vs.* James, 4 Camp., 112.

† Walker *vs.* Smith, 4 Dall., 389.

‡ On Insurance, Book L., Ch. VIII., § 2, 297.

another, and has either wholly neglected to do it, or does it improperly or unskillfully, an action on the case will lie against him to recover a satisfaction for the loss or damage resulting from his negligence, carelessness, or want of skill." In an action against a broker for negligence or unskillfulness in effecting an insurance, "the plaintiff," says the same author,\* "is entitled to recover the same amount as he might have recovered against the underwriters had the policy been properly effected." "And so," says Mr. Phillips,† "the agent puts himself in the place of the underwriters and must pay the loss, or the part of it for which the underwriter is not liable, but for which he would have been liable had the policy been made according to the instructions, or in such manner as the principal had a right to expect and require."‡

The same principle was applied in an action of assumpsit,§ where the defendants had been employed as factors to settle with underwriters as for a total loss. The defendants adjusted the loss at 20 per cent., and canceled the policy; and the court said: "If the defendants, as agents or factors of the plaintiffs, have, through mistake or design, disobeyed their instructions, they are undoubtedly responsible, and are to be considered as substituted for the insurers. This was a point conceded on the argument;" and a motion for a new trial on the ground of excessive damages was denied.

But the plaintiff can only have judgment for the same sum which in point of law he might have recovered on the policy, and not for any amount which the indulgence or liberality of the underwriters might possibly have induced them to pay. So,|| where the plaintiff had requested insurance to be effected at Liverpool on certain slaves, and the defendant had neglected it, it was contended that though the plaintiff could not have recovered the value of the slaves in an action against the underwriters, yet, that in point of fact these slaves were fre-

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\* Vol. 1, 800, B. 1, Ch. VIII, § 2.

† On Insurance, Vol. 2, 566, ch. 22.

‡ Delaney *vs.* Stoddart, 1 T. R., 22; Wilkinson *vs.* Coverdale, 1 Esp., 75; Wallace *vs.* Telfair, 1 Esp., 76; Thorne *vs.* Deas, 4 J. R., 84; Miner *vs.* Taggart, 8 Bin., 204; De Tastett *vs.* Croussillat, 2 Wash. C. C. R., 132; Harding *vs.* Carter, Park on Insurance, 4.

§ Rundle *vs.* Moore, 8 J. C., 86.

|| Webster *vs.* De Tastet, 7 T. R., 157.



quently the subject of insurance at Liverpool, where the loss was always paid by the underwriters without disputing the question; and that consequently the plaintiff might recover the value of them in this action, because, by means of the defendant's negligence the plaintiff had sustained the loss. "But the court were clearly of opinion that the slaves were not the subject of insurance, and that the plaintiff could not recover in this action more than he could have recovered *in an action* against the underwriters."\* "And so," says Mr. Justice Story,† "there must be a real loss or actual damage, and not merely a probable or possible one." So, if the ship deviate, or the voyage or insurance be illegal, or the principal had no interest, or the voyage as described in the order would not have covered the risk—in all such cases the agent will not be responsible.

Nor will the plaintiff in such an action be allowed the costs of an unsuccessful suit against the underwriters, unless such action was necessary or brought by the direction of the agent. So,‡ where the plaintiff had been nonsuited in an action against the underwriters, on the ground of concealment of material information, and in the suit against his agent, claimed to include the costs of the action on the policy; Lord Eldon said, that there was no necessity to bring that action to entitle the plaintiff to recover in the aforesaid case, and as it did not appear that the action on the policy was brought by the desire or with the concurrence of the present defendant, he ought not to be charged with the costs of it; and this is in analogy to the rule, as we have seen it laid down between principal and surety.

But assuming that the principal is entitled to demand of the defaulting agent remuneration for his loss, the embarrassing question constantly recurs; what is the limit of the compensation that he seeks? The general rule undoubtedly is in this, as in all other cases of contract, that the damage actually sustained is the criterion of remuneration. So in the State of Alabama, where an agent was instructed not to sell cotton for less than 14 cents a pound, it was held that a disregard of these orders did not authorize the principal to recover up to the limit he had

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\* See, also, *Fomin vs. Oswald*, 8 Camp., 357.

† Agency, § 222.

‡ *Seller vs. Work*, Marshall, 299, Book I., Ch. VIII., § 2.



set, but that the criterion was the price at which other cotton of that quality had been sold during the season.\* So, too, when the plaintiff had instructed the defendant not to sell a horse for less than \$500, and the orders were disobeyed, it was nevertheless held that, notwithstanding the instructions, the plaintiff could only recover the actual value of the animal.†

But I confess the reasoning of these cases appears to me doubtful. Where an agent accepts a consignment with limits of sale, and by selling contrary to orders puts it out of his power to return the goods, or the price understood and fixed on beforehand, it seems the least he is legally bound to do is to pay the value at which the owner had previously appraised them.

In a case in the King's Bench,‡ the plaintiffs, who had shipped certain goods on board the *Mary Stevens*, to be carried from Liverpool to Trieste, brought their action against the owners of the ship on the ground that the vessel had deviated, and having subsequently been captured, the plaintiffs had thus lost the benefit of a policy of insurance. The cost price of the goods, with the shipping charges, amounted to £4,411 13s. 9d. The plaintiffs had paid for premium of insurance, £720 16s. 6d. The defendants had paid the plaintiffs the sum of £4,411 13s. 9d., but refused to pay the £720 16s. 6d.

And Lord Ellenborough said that the premiums were not recoverable.

"The plaintiffs," said the learned judge, "were entitled to recover the value of their goods on board the ship at the time she was captured by means of the deviation. They had actually received the cost price, together with the shipping charges. I have no evidence before me that the goods were worth more. The case is silent as to the profits of the adventure. Had there been no insurance, I could not have said, without proof, that the goods were worth more than the cost price and shipping charges, and I cannot say that, by the mere act of insurance, the value of the goods is enhanced by the amount of the premiums."

This decision may, with great deference, be questioned. Here the plaintiff had actually disbursed the sum of £720,

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\* *Austill vs. Crawford*, 7 Alaba., 335.

† *Ainsworth vs. Partillo*, 13 Alaba., N. S., 460; and see, to same point, *Blot vs. Boiceau*, 8 Comst., 78.

‡ *Parker vs. James*, 4 Camp., 112, (1814).

which became of no value to them by the act of the defendant, and it would seem that the burden of proof should have been thrown on the defendant, obliging him to prove that the disbursement in question could have been of no service to the plaintiff.

A case in the Supreme Court of the United States\* exhibits another species of injury inflicted by an agent on a principal. Cunningham & Co., of Boston, owners of the Halcyon, sent her from Havana to the defendants below, Bell De Yough & Co., with directions to invest of the freight (which was about 4,600 pesos), 2,200 pesos in marble tiles, and the balance in wrapping paper, to be shipped by the same vessel to Havana. The defendants disobeyed the directions, and invested the whole in wrapping paper. The tiles would have made a considerable profit, the paper made a heavy loss. Trial and verdict for the plaintiff; exception and writ of error. The plaintiffs in error (the defendants below), insisted that Cunningham & Co. were entitled to no more than the value of the money at Leghorn, which ought to have been invested in tiles, and not its value in Havana; or, in other words, that the value of 2,200 pesos at Leghorn, with interest, and not the value of the tiles at Havana, ought to be given. But the Court overruled this, saying, "that it would be tantamount to a declaration that the breach of contract consisted in the *non-payment* of two thousand two hundred pesos, not in the *failure to invest that sum* in tiles. Speculative damages dependent on possible successive schemes, ought never to be given; but positive and direct loss, resulting plainly and immediately from the breach of orders, may be taken into the estimate. Thus, in this case, an estimate of possible profit to be derived from investments at the Havana of the money arising from the sale of the tiles, taking into view a distinct operation, would have been to transcend the proper limits which a jury ought to respect; but the actual value of the tiles themselves at the Havana affords a reasonable standard for the estimate of damages."†

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\* Bell vs. Cunningham, 3 Peters, 69, (1830).

† This case will be found reported at nisi prius, 5 Mason, 161; where Story, J., told the jury, in very general terms, that they were at liberty to compensate the plaintiffs for the actual loss sustained in consequence of the defendants' default, but were not at liberty to give vindictive damages.

So in Louisiana, an agent failing to ship goods, which he was directed by the principal to do, is liable for the actual value of the goods at the port of destination.\*

This allowance of the value which the goods would have had at the place intended for the sale, amounts to an allowance of profits, on the principles which we have heretofore had occasion to consider.†

In New York, the rule that has been stated was early applied to a case of considerable magnitude,‡ and carried, even to a greater extent. Le Guen being owner of a large quantity of cotton and indigo, employed the defendants, Gouverneur & Kemble, to sell it for him. They sold it to Gomez, Lopez & Livera for \$122,415 36, for which the purchasers gave their promissory notes, payable in a year. The cargo was to be shipped to France; and it was stipulated by a written contract, that the proceeds of the property in France should be first applied towards payment of the purchase money, and further, that Gouverneur & Kemble might have it at their option to receive the whole or any part of the cotton at any port where the vessel carrying the property might discharge in Europe. The plaintiff, Le Guen, made repeated applications to the defendants to make election to receive the purchase money out of the proceeds of the cargo in Europe, and to give an authority by which the plaintiff might receive the surplus thereof, after the defendants had retained a sufficient sum to indemnify them for all their advances and responsibilities on account of the plaintiff. This the defendants refused to do; and for this violation of their duty as agents, the plaintiff brought an action, charging them with the whole price agreed to be paid for the property by Gomez & Co. Benson, J., in delivering the opinion of the Supreme Court, said: (p. 466.)

"The remaining question is as to the rule by which the jury have assessed the damages, and which from the record appears to have been the amount agreed on by the contract as the price of the cotton and indigo. I have already

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\* *Ryder vs. Thayer*, 8 La. Ann. R., 149. In this case exemplary damages were claimed; but the Court said, "In case of a breach of contract, whether by the negligence or fraud of a party, no other sum can be allowed as damages than that which fully indemnifies the creditor."

† Vide, Chap. 8, 69, et seq.

‡ *Le Guen vs. Gouverneur & Kemble*, 1 J. Cases, 436, (1800).

mentioned such of the rights of the factor as can have any relation to the question between the present parties. I now briefly state his duty generally to be, that he is to follow the orders of his principal; and for a breach of these orders he is to answer in damages to his principal; if the breach is merely partial, and as to certain parcels or particulars only, he shall not be held to answer further than as to such parcels or particulars; but if the breach is such as to involve the whole of the property intrusted to him, he shall then be held to answer for the value of the whole of the property, and as such value was, at the time the breach of orders took place; and if the property consisted in credits, to answer to the amount of the credits, and the principal may from that moment abandon to him the whole of the property."

The real question decided as to the measure of damages, appears still more fully from the points taken on the argument of the writ of error which was brought upon this judgment. It appears by these points, that the defendants insisted that they should have been allowed to show that the plaintiff, Le Guen, had in reality, sustained no loss, that the property had sold at a ruinous sacrifice, and that they should have been permitted to prove what the proceeds of the cargo in Europe really were. For that purpose they say a witness who was in Europe and superintended the sales had attended the trial. The plaintiff, on the other side, contended that no inquiry should have been allowed as to the actual damage. And the Court of Errors affirmed the judgment of the Supreme Court.

This case is, however, as to the measure of damages, substantially overruled by a very recent case, which I now proceed to examine. And it seems at length to be well settled, that if orders have been disobeyed, and injury results, the loss shall *prima facie* be ascribed to the disobedience of orders, and that in the absence of conflicting proof, the *prima facie* evidence shall be deemed conclusive; but that the agent shall always be at liberty to show that if the order had been obeyed, the same damage would have resulted, or that the real loss is much less than the plaintiff's claim.\*

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\* It is true that Lansing, J., said that, "the refusal of Gouverneur and Kemble to authorize Le Guen to receive such surplus was a violation of their trust, which amounts to full evidence of an intent to convert the whole to their own use, regardless of the interests or instructions of their principals." This assimilates the case to an action of trover. But this ought not to alter the rule of damages, if to be governed by the consideration of compensation for injury actually done. If, on the other hand, the case showed fraud or malice, then a much larger discretion should have been left to the jury.

In an action on the case for negligence\* in omitting, within a reasonable time, to present a draft for acceptance, the liability of the defendants was admitted. The Judge of the Superior Court, where the cause was tried, charged, "that the Court and jury, having no knowledge of what the amount of damages was, except from the proof of the amount of the draft, the jury would find the verdict for the plaintiffs for the draft and for the interest thereon." A verdict having been found for the plaintiffs, the Supreme Court, after reciting the part of the charge in question, said: "Certainly, if there were any thing appearing in mitigation it should have been put to the jury. The difficulty lies in discovering any real ground; the jury must have been left to decide by the merest conjecture. The case seems to have been *prima facie* one of simple total loss, by the fault of the defendants below." But the Court of Errors reversed this judgment, on the ground that the amount of actual damage sustained, should have been left to the jury.† The Chancellor said:

"Where there is a reasonable probability that the bill would have been accepted and paid, if the agent had done his duty; or where, by the negligence of the agent, the liability of a drawer or indorser, who was apparently able to pay the bill, has been discharged, so that the owner of the bill cannot legally recover against such drawer or indorser, I admit, the agent by whose negligence the loss has occurred is, *prima facie*, liable for the whole amount thereof with interest, as damages, unless he is able to satisfy the court and jury that the whole amount of the bill has not been actually lost to the owner in consequence of such negligence. The case under consideration, however, is one of a very different description. Here it is perfectly evident, from the testimony of one of the drawees, that the draft would not have been accepted at any time after it was received by the Allens for collection, as the drawees had received express directions from the drawer not to accept, nor would they have accepted it even without such a prohibition, unless they had previously been advised so to do by the drawer. The fact also, that the drawer's credit was not good at the time this draft was received for collection, he having suffered his note to Boyd & Suydam to lie under protest for some time, and the express directions given by him to the drawers not to accept this draft, rendered it highly improbable that he would have paid the draft himself to save his credit, if it had been sent back protested at an earlier day. From the facts of the case, therefore, I think there was no ground for supposing that the owners had sustained any actual damage from the mistake of the Allens, in not sending on

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\* Suydam vs. Allen, 20 Wend., 321.

† Mr. Senator Verplanck delivered a very able dissenting opinion as to the rule of damages.

the bill for acceptance immediately after they received it for collection in New York; or that their chance of obtaining payment from the drawer was materially impaired by the delay of the protest for a few days. Under the circumstances of this case, therefore, I think the jury should have been instructed that, upon the evidence, the plaintiffs were only entitled to nominal damages, or at least, they should have been told to find only such damages as they should, from the evidence, believe it probable the plaintiffs might have sustained by the delay in presenting the draft for acceptance immediately; for I do not see how it is possible for any one to believe, or even to suppose it probable, from this evidence, that the whole amount of this draft was in fact lost to the plaintiffs below, by the delay of the Allens in presenting it to the drawees, and giving notice of the dishonor thereof immediately to the drawer, who never intended that it should be accepted and paid.\*

In a case in Pennsylvania, where the principal sued the agent for neglect, the neglect complained of was in regard to the liability of the defendant for a debt of one Young, which he had failed to collect and secure. The plaintiff insisted that the defendant had by his neglect made himself liable for the whole amount of the debt. The defendant, on the other hand, contended that the plaintiff was bound to prove his actual loss, and that he could recover no more. But the Supreme Court of Pennsylvania held that the burden lay on the defendant, as to the actual loss; and no such proof being given, that the defendant had made himself liable to the plaintiff for the full value of the goods placed in the hands of Young, or at least for the amount of money produced by the sales made of them.†

In this decision, the court recognized as a general rule, however, that for an agent's omission to keep the principal regularly informed of the agent's transactions and the state of the interests intrusted to him, the measure of damages is to be proportioned to the actual loss sustained; with the exception, where the information transmitted is such as to induce the principal, in the adaptation of his operations to his means, to rely on an outstanding debt as a fund on which he may confidently draw, that in such case the agent makes the debt his own.

In Massachusetts, it has been held, that an agent who un-

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\* See this case commented on and explained, as to the liability of banks for negligence in such cases, in *The Bank of Orleans vs. Smith*, 8 Hill, 560. See, also, *Hoard vs. Garner*, 8 Sandf. S. C. R., 179, and *supra*, 340.

† *Brown vs. Arott*, 6 Watts. & Serg., 402. S. C., 6 Wharton, 9. *Harvey vs. Turner*, 4 Rawle, 229. In Massachusetts, see *Amory vs. Hamilton*, 17 Mass., 108.

reasonably neglects to inform his principal of the receipt of money, is liable for interest, although he acted in good faith.\*

In New Hampshire, where goods are consigned† to a commission merchant or factor for sale, and the factor sells at a price below the limit without notice, it has been held that the consignor may recover damages, or may have the amount of the damages allowed in a suit brought by the factor to recover his advances. The measure of damages in such a case is the amount of injury sustained by the sale contrary to the orders of the principal. If no actual loss appeared to have been sustained in consequence of the wrongful act, the principal will be entitled only to nominal damages.

And in accordance with this case it has been held in New York, where a factor sold contrary to his principal's orders, and below his limits, that he could discharge himself from liability by showing that the articles in question could not be made to bring more than the sum which they produced, or in other words that the goods were never worth more than they actually sold for.‡

In Louisiana, where wine was consigned by a New York house to the defendant, a New Orleans agent, to sell at a limited price, the defendant, after keeping it a long time on hand, re-shipped it without further directions to the plaintiffs at New York, who received it, but under protest, and wrote to the defendant that they abandoned the property, and held it merely as belonging to the defendant, and subject to his order. It was afterwards sold to them at auction in New York, but at a price below the first limit, and they then sued the defendant for the damages resulting from the disobedience of their orders, insisting that they were entitled to recover the full value of the wine. But the Supreme Court of Louisiana held that the measure of damages ought to be the value of the wine at the highest market price in New Orleans at any time before the suit brought, adding thereto the freight to New York, and deducting therefrom the value of the wine at New York, where the plaintiffs re-sold it.§

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\* Dodge *vs.* Perkins, 9 Pick., 368; Clark *vs.* Moody, 17 Mass., 145, 149.

† Frothingham *vs.* Everton, 12 N. H. R., 239.

‡ Blot *vs.* Boiceau, 8 Comstock R., 78; S. C., 1 Sandf. S. C. R., 111, and *vide supra*, 344.

§ Nelson *vs.* Morgan, 2 Martin, L. R., 257.



In an action brought by principal against factor, for selling cotton contrary to orders, it appeared that it was sold on the third of June, and the plaintiff insisted it should not have been sold before the twenty-third of August. The Supreme Court of the United States said: "Supposing the sale made by the defendants on the third of June to have been tortious and in violation of orders, the plaintiff had his election, either to claim damages for the value of the cotton on that day, as a case of tortious conversion, or for the value of the cotton the twenty-third of August following, when the letter of the plaintiff of the twenty-third of July was received, which authorized a sale. If the price of cotton on that day was higher than at any intermediate period, he was entitled to the benefit thereof. If, on the other hand, the price was lower, he could not justly be said to be damnified to any extent beyond what he would lose by the difference of the price of cotton on the third of June, and the price on the twenty-third of August."

We turn now to the claims of agents against their principals ; or of servants against their masters, for we have already observed that the contracts of agency and of service are nearly allied. We have already\* considered the question, how far the principal is liable to pay his servant or other agent, who is engaged for a specific time, and without sufficient reason quits the employment. But the question often arises to what extent the principal is liable when on the other hand he discharges the agent without legal excuse. In a recent English case† the plaintiff was employed as clerk, to do the business of shipping agent at Southampton, under a contract of hiring for two years, at £150 for the first year, £160 for the second year, and also 50 per cent. on the gross profits. The defendant, alleging disobedience of orders and misappropriation of moneys, discharged him. The jury found these issues against the defendant and gave the plaintiff a verdict for twelve months' salary and twelve months' share of profits. One year's salary within a trifling sum appears to have been paid. A motion was made to set aside the verdict on the ground that the damages were excessive, but it was denied. Wilde, C. J., said, "With respect to the amount of damages, it was for the jury to say what amount of compen-

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\* *Supra*, 216, et seq.

† *Smith vs. Thompson*, 8 Man. Gr. & S., 42.



sation the plaintiff was entitled to for the defendant's breach of contract." And Maule, J., said, "There is no ground for saying that the damages were miscomputed. It must be borne in mind that embezzlement was imputed to the plaintiff." The result at which the verdict arrived seems not open to observation. But the language of the Court appears by no means equally free from objection. Why, in a case of this kind of simple contract, is it for the jury to fix without control the defendant's liability? and what has a charge of embezzlement set up in the plea, to do with the quantum of damages? If in a case of this description there is no rule of damages, it would seem to be difficult to declare one in any; and if an unfounded defense is to have the effect of turning an action of contract into one of tort, and to give the uncontrolled discretion of the subject to the jury, the principles which govern the measure of damages will in all cases be in great risk of being lost sight of. That there is a rule in cases of this kind seems not to me to be doubtful; and it is, that the plaintiff has a right to recover the stipulated wages for the full time, subject to the defendant's right to recover whatever the plaintiff might during the period have reasonably earned.

So again, where it was agreed between the plaintiff and the defendant that in case of a vacancy occurring in the command of a certain East India vessel the plaintiff should be appointed for two voyages, it was held that the jury *might* give damages for what the plaintiff could have earned on both the voyages, and that they were not limited to one.\* Here, too, I apprehend that the jury were *bound* to give their verdict for both the voyages, subject, of course, to the right to recoupment.

It has been very justly decided in Massachusetts, that a factor cannot recover commissions when there is a loss to a greater amount occasioned by his own fault, nor can he recover expenses occasioned by his negligence.† But it is well settled that if an agent, without default, incurs losses or damages in the course of transacting the business of his agency, or in following the instructions of his principal, he will be entitled to full compensation therefor.‡ So an agent has been allowed to recover

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\* Richardson vs. Mellish, 2 Bing., 229.

† Dodge vs. Tileston, 12 Pick., 328.

‡ Story on Agency, § 339.

the damages paid by him on a protested bill drawn for his principal's benefit.\* So an agent, who was indemnified against the commission of an act which was not known at the time to be a trespass, but which proved to be such, was allowed to recover against his principal the amount of the judgment recovered against himself.† And it is quite immaterial in these cases, whether the agent have a promise to indemnify him or not; the law implies an agreement on the part of the principal to save him harmless.‡

It has been said that if an agent abroad, as for example, a foreign factor, should, at his own risk and peril, evade the payment of foreign customs and duties, he would still be entitled to charge them against his principal, as if they had been actually paid. But the lively moral sense of Mr. Justice Story is shocked at this idea; and he justly says, that it may well be doubted whether this doctrine is sound or maintainable.§

Where merchants here gave a written engagement to their agents at the Havana, to save them harmless from all costs, damages, and expenses which might arise in consequence of any law-suit which then was or might be brought against them for the recovery of freight or average on the cargo of a certain ship, it was held that the agents were entitled to recover for money which they were obliged to pay in consequence of legal proceedings on an award made previous to obtaining the written engagement.||

It has been held, that where a factor employs a sub-agent for the purpose of carrying out the instructions of the principal, if the sub-agent, by neglecting the directions of the factor, commit a breach of duty for which the factor is compelled to answer the principal in damages, the factor will be entitled to recover over from the sub-agent the damages which he has so sustained. This is the measure of his damages. Thus,¶ where

\* *Ramsay vs. Gardner*, 11 J. R., 489.

† *Coventry vs. Barton*, 17 J. R., 142.

Powell *vs.* Trustees of Newburgh, 19 J. R., 284. *D'Arcy vs. Lyle*, 5 Binn., 441; *Stocking vs. Sage*, 1 Day Conn., 522. Story on Agency, § 839.

§ Story on Agency, § 848, and authorities there cited.

|| *Hill vs. Packard*, 5 Wend., 875. See, also, *Rogers vs. Kneeland*, 10 Wend., 219; *S. C. in Error*, 18 Wend., 114. In Pennsylvania, see *Tiernan vs. Andrews*, 4 Wash. C. C. R., 564, and *Elliott vs. Walker*, 1 Rawle, 126.

¶ *Mainwaring vs. Brandon*, 8 Taunton, 202, (1818).

the plaintiff had been commissioned by Gevers & Co. to ship a quantity of *best* Porto Rico tobacco for them to Holland, the defendants were employed by the plaintiffs to execute the order, but bought Porto Rico tobacco, *not* of the *best* quality, and which was proved at the trial to be very bad. Gevers & Co. refused to receive it, and sued the present plaintiffs. They notified the defendants to furnish a defense to the action. Gevers & Co. recovered, and it was contended in the action against the sub-agent, that the measure of damages was the amount recovered by Gevers & Co. in the former suit, with the costs thereof. The defendants insisted that the true measure of damages was either the difference between the relative prices of the article in the London market, or between the relative values in the market in Holland; but the court held that the measure of relief should be the damages and costs recovered in the first action against the plaintiffs—the plaintiffs undertaking to assign the tobacco, or to sell it, and account to the defendants for the proceeds; and this having been so held at the sittings, a rule for a new trial was refused.\* And on the analogous cases of warranties and sureties, it seems very rightly decided.

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\* Vide Russell on Factors and Brokers, 257.

## CHAPTER XIII.

### THE MEASURE OF DAMAGES IN REGARD TO COMMON CARRIERS, AND UPON BILLS OF LADING.

The value of the article at the place of destination fixes the measure of damages—  
Cases examined—Mode of arriving at the value—Rule, when suit is brought by  
Carrier on breach of agreement to furnish freight.

THE class of cases which we now proceed to consider, like those discussed in the last chapter, cannot be made to conform to the line that separates our forms of proceedings; as the actions against common carriers may be framed either *ex contractu* upon the breach of the engagement, or *ex delicto* upon the violation of the public duty. But we shall find that, whether the action be assumpsit on the contract, or case on the violation of duty, the measure of damages is equally a question of law, and as much under the control of the court, as if the right rested in agreement merely. The liabilities flowing from bills of lading, which are express contracts, and can only be treated as such, will also be examined under this head. In this class, however, are by no means included those cases where carriers are sued for injuries to the person resulting from negligence. In these no recovery can be had, unless misconduct on the defendant's part is proved; and then, although there be no express malice or deliberate intent to injure, still the law, unable to fix on any precise rule of compensation, surrenders the matter to the control of the jury, subject always to the restriction that their verdict must be free from corruption, prejudice, or passion.

As a general rule, where goods are entrusted to a carrier, and they are not delivered according to the contract, the value of the goods with interest thereon from the day when they should have been delivered, is the measure of damages.\* But the

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\* Ludwig *vs.* Mayer, 5 Watts & Serg., 485; Hand *vs.* Baynes, 4 Wharton, 204. Segura *vs.* Reed, 3 La. Ann. R., 695.

question at once arises, whether that value is to be computed at the place where delivered to the carrier, or at the place of destination. We have seen it said that, in cases of illegal capture and of collision, the actual damage sustained at the time and place of the injury fixes the measure of damages ;\* but in regard to carriers, it seems to be well settled that the analogy of this rule does not hold good, and that the measure of damages is the value of the goods at the place of destination. This sometimes involves an inquiry into foreign markets, and will generally include the profits of the adventure ; but it has been rightly held that nothing less will satisfy the contract. It is the value of the article at the place of delivery, that the plaintiff, relying on the carrier, has lost ; it is that value which he would have received if the contract had been performed. If the goods have been transported by the carrier, he is entitled to deduct his freight ; but if he do not perform any part of his contract, then the difference between the value of the article at the place of shipment and at the place of delivery, furnishes the measure of damages, deducting in this case also the freight or price of carriage. If, however, another conveyance can be found by using ordinary care, the plaintiff is bound to do so ; and in such case, the measure of damages will be merely the difference between the freight or price of carriage agreed on with the defendant and the sum (if greater), which the plaintiff has been obliged to pay others. We shall best understand the application of these rules by an examination of the adjudged cases.

In an action of *assumpsit*† against the defendants, as ship owners, for not delivering a cargo of wheat consigned to the plaintiffs, the cargo reached the port of discharge, but was not delivered, and the price of the cargo at the time it reached its port of destination was held to be the true rule of damages. “As between the parties in this cause,” said Parke, J., “the plaintiffs are entitled to be put in the same situation as they would have been if the cargo had been delivered to their order at the time when it was delivered to the wrong party ; and the sum it would have fetched at that time is the amount of the loss sustained by non-performance of the defendant’s contract.”

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\* *Supra*, 78, 79, et seq.

† *Brandt vs. Bowiby*, 2 Barn. & Adol., 982.

In New York, the same rule has been laid down in an action against the master of a vessel, where the goods had been embezzled on the voyage without fraud on the part of the defendant;\* and this language was held as to interest: "The question of interest depends on circumstances. The jury may give interest by way of damages, in cases in which the conduct of the master was improper. But here no bad conduct is to be imputed to him, and interest is not in every case and of course recoverable, because the amount of the loss is unliquidated, and sounds in damages to be assessed by the jury."

So in another case,† where suit was brought on an agreement to carry a quantity of salt from Oswego to Queenston, the difference in value of the article at Oswego and at Queenston at the time, was held the true rule of damages. And the same rule, with the same modification as to interest, was again laid down by the same court.‡

In Pennsylvania,§ the doctrine of the State of New York has been affirmed. It was an action on the case, brought to recover damages of the defendant for refusing to transport wheat from Pittsburgh to Philadelphia, according to contract. The transportation was prevented by the approaching freezing of the canal. The defendant contended that the measure of damages was the difference between the price agreed on for the freight, and that for which their carriage might have been obtained by

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\* *Watkinson vs. Laughton*, 8 J. R., 218. See, also, *Smith vs. Richardson*, 3 Caines, 219. See, also, *Elliott vs. Rossell*, 10 J. R., 1.

† *Bracket vs. McNair*, 14 J. R., 170.

‡ *Amory vs. McGregor*, 15 J. R., 24. See, also, *Edminson vs. Baxter*, 4 Hayw., 114. The Superior Court of New York, in *Wheelwright vs. Beers*, 2 Hall, 391, against the dissenting opinion of Oakley, J., adopted a different rule. It was an action of covenant on a charter party, by which the defendant had stipulated that the Champion should perform a voyage from New York to Omoa and back.

The vessel proved unseaworthy, put into Norfolk, where the voyage was broken up and the plaintiff's cargo sold. It was held that the loss on the goods (*taking them at their invoice price*) resulting from the sale, was the true rule of damages, on the ground that there was no fault or fraud on the part of the defendant, and that the case showed only a breach of the implied warranty of seaworthiness.

The previous cases, as we have seen, do not go on the ground of *fault or fraud*; they turn simply on the breach of contract, and it would seem that the rule should be the same, whether the defendant agrees to transport the goods to their place of destination, or that his ship shall do it.

An early case, *Smith et al. vs. Richardson*, 3 Caines' N. Y. T. R., 219, turned on a question slightly different; but it seems imperfectly reported, and it is only necessary here to refer to it.

§ *O'Connor vs. Foster*, 10 Watt, 418.

others ; and the court said that this would be the rule, if the plaintiff *could* have obtained another conveyance. "The plaintiff would have no right, by his own negligence or want of care to incur a voluntary loss for the purpose of imposing it on the defendant as a penalty for the breach of contract. If, as is usually the case here, another conveyance could have been obtained for this wheat before the canal froze up, by a little extra expense and the delay of a day or two, he would have no right to claim greater damages than would have been incurred by such extra expenses and delay." But the defendant offering no such proof, the true rule of damages was held to be, the difference between the value of the wheat in Pittsburgh, with the freight added, and the market price at Philadelphia, at the time it would have arrived there if carried according to the contract.

In a case on the Massachusetts circuit,\* where a libel was filed in admiralty against vessel and master for not delivering a cargo at Velasco, the vessel arrived out, and the consignee refusing to receive it, the master, contrary to his duty, carried it on to New Orleans. It was held that the libelants were entitled to recover the actual value at Velasco at the time when the cargo should have been landed there, deducting all duties and charges and the freight for the voyage, as if the cargo had been duly landed ; and Mr. Justice Story said, that the rule adopted in prize cases, of an addition of ten per cent. to the price cost of the cargo, did not apply to cases like the present ; that rule ordinarily supposing that the vessel has been captured before she arrived at the port of destination, and the court making the presumption of the additional value of 10 per cent. in *odium spoliatoris*.

In Massachusetts, it has been intimated that where a package is delivered to a common carrier, whose liability is unlimited by notice, though the party delivering is not obliged to state its value unless inquiry is made, yet if on inquiry a false answer be given, or any concealment or deception be practiced, the carrier will not be held responsible for the subsequent accident.†

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\* Arthur et al. vs. The Schr. Cassius, 2 Story, 81.

† Dwight vs. Brewster, 1 Pick., 50. Phillips vs. Earle, 8 Pick., 182.

In the same State, in another case, it was agreed by bill of lading, that the net proceeds of cargo at the port of destination should be paid to the shippers in 90 days after the return of the vessel to her home port; the ship having arrived out, the goods were sold, and the proceeds invested by the owners of the ship on their own account, in return cargo; the ship met with disaster and injured her cargo 50 per cent., but arrived at her home port; and it was held that the shippers were entitled to recover the whole net amount for which the adventure was sold in the foreign port.\*

Where the plaintiff complained not of non-delivery, but of delay of arrival, and in consequence of the delay it became necessary to remove the goods to another place to sell them, it was considered that the expenses of such removal were rightly recoverable; but the question of such necessity is of course for the jury.†

We have next to inquire in regard to the mode in which the value of the article shall be arrived at. In New York,‡ where case was brought against a carrier for delay in forwarding Alpine mulberry trees, in consequence of which a portion were destroyed, the plaintiff claimed as his damages, the market value of the trees—four shillings each. The defendant's counsel offered to prove that, from subsequent experiments, this kind of tree had been ascertained to be of no intrinsic value; that the value put on them when the injury occurred was factitious; and that if as much had been known of them then as at the time of trial, they could have been bought for one cent each. He further offered to prove, that Alpine mulberry trees were not worth cultivating for the purpose of raising silkworms, that those in question were purchased by the plaintiff with a view of growing seedlings for sale, and that they were of no value for that purpose the next year after they were bought. These offers were overruled, and (notwithstanding the dissenting opinion of Cowen, J.) the Supreme Court held, rightly. Nelson, J., in delivering the opinion of the Court, said:

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\* *Wallis vs. Cook*, 10 Mass., 510. *Winchester vs. Patterson*, 17 Mass., 62.

† *Black vs. Baxendale*, 1 Exch. Rep., 410.

‡ *Smith vs. Griffith*, 8 Hill, 333.



"The damages should afford the plaintiff an adequate indemnity for the loss sustained at the *time the injury happened*. Assuming that there is no defect in the quality of the article, the fair test of *its value*, and consequently of the loss to the owner, is its price at *the time in the market*." "The objection to the evidence offered is, that it proposes to take into consideration the fluctuations of the market value long *subsequent to the time* when the injury happened, thereby making the measure of damages to depend on the accidental fall of prices at some future period, which might or might not occur, and if it did, the loss might or might not have fallen on the plaintiff, as for aught the court or jury could know he may have parted with the property before its depreciation."

The general rule that we have noticed, when discussing the subject of agency, applies also to the class of cases which we are now examining, viz: that if the carrier break his contract or disobey his orders, any subsequent loss will be attributed to his illegal act; but it is still competent for him to show that if he had performed his contract the same loss would have resulted to his employer; and in such a case the verdict will be for nominal damages only.

An action was brought in the English Common Pleas, against the owner of a ship for a breach of an agreement that she should, with all convenient speed, after discharging her cargo at Plymouth, proceed to Liverpool and take in a cargo of salt for Terceira, and after delivering it, should go to St. Maloes for fruit. The captain refused to go to Terceira, on the ground that that port was blockaded. But as to whether it was an effective blockade or not there was much contradictory testimony. Tindal, C. J., charged, that if the ship when she arrived off Terceira would have been prevented from entering by an effective blockade, then it would be a case for nominal damages only. But if otherwise, or if by waiting a reasonable time she could have got in; the jury should not confine themselves to nominal damages.

It is well settled, that in case of negligence, the subsequent acceptance of the goods is no bar to an action for injuries such as those of which we have been treating. Nothing but a release or satisfaction constitutes such a bar. But acceptance may be given in evidence in mitigation of damages, so as to limit the recovery to the actual loss sustained by the owner.\*

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\* Story on Bailments, § 562 a. Bowman vs. Teall, 28 Wend., 806. Baylis vs.

An interesting question is sometimes presented, where the carrier brings suit on the violation of an agreement to furnish him a stipulated quantity of freight. And here the principle applies which we have already had occasion to notice,\* that the party plaintiff is bound to take reasonable measures to reduce the amount of injury consequent on the defendant's default; and it is held that the carrier must stand ready to receive any other freight that is offered, and thus, as far as is reasonably practicable, avoid throwing an unnecessary loss on the party in default. Thus in New York, it has been decided, where a party contracts to load a ship with a given number of tons at a stipulated price and fails to deliver the whole quantity, that if goods are offered by a third person to be shipped, to an amount sufficient to make up the deficiency, though at a reduced rate of compensation, but still at current prices, the owner or master is bound to receive such goods, and place to the credit of the original charterer the net earnings of the substituted cargo, after making all reasonable deductions resulting from the circumstances of the case; and such is the English rule.†

In a case‡ that came up to the Supreme Court of the United States, from the Pennsylvania circuit, the plaintiff's intestate agreed to deliver for the defendant at St. Louis by a certain time a quantity of army stores, *supposed* to amount to 3,700 barrels, which the defendant on his part agreed to furnish on the Ohio River; the defendant to pay a certain sum per barrel, one half to be paid at St. Louis and the other half at Cincinnati, with a memorandum "that the payment to be made at Cincinnati was to be made in the paper of the Miami Exporting Company, or its equivalent." The defendant did not furnish the whole 3,700 barrels; and the plaintiff brought suit, as well for the freight of the portion delivered, as damages

Fisher, 4 Moore & P., 790. S. C., 7 Bing., 153. Willoughby *vs.* Backhouse, 2 Barn. & Cres., 821.

\* *Supra*, 98, and see post, Ch. XVII., Recoupment.

† *Hecksher vs. McCrea*, 24 Wend., 304. *Shannon vs. Comstock*, 21 Wend., 457. *Pullen vs. Staniforth*, 11 East, 232. See these cases cited and confirmed in *Costigan vs. Mohawk & Hudson R. R. Co.*, 2 Denio, 610. See, also, the reasoning of these cases adopted in *Arkansas*, in an able opinion of Scott, J., as to a contract for personal services, *Walworth vs. Pool*, 4 English, 394. *Abbott on Shipping*, Part IV., Ch. I. Of the carriage of goods in merchant ships, and cases there cited.

‡ *Robinson vs. Noble's Adm'rs*, 8 Peters, 181.

for the non-delivery of the remainder. The notes of the Miami Company were not worth more than 66 per cent. The judge who tried the cause, held :

"That the plaintiff could not recover damages, according to the *number of tons* the boat was capable of containing. The rule of law in cases where there has been a failure to furnish the stipulated freight and there exists no charter party, is for the jury to take all the circumstances into consideration, and to make an allowance for any freight which the master has it in his power to transport in addition to that which was furnished. If the lading should not be complete without the default of the master, the rule is to estimate the freight by means of an average, so as to take neither the greatest possible freight nor the least ; and such average is the proper measure of damages."

And that as to the paper of the Miami Exporting Company, the defendant having failed to tender to the plaintiff's intestate that paper or its equivalent, the plaintiff was entitled to recover the amount in specie with interest. The Supreme Court reversed this judgment, on the grounds that the defendant had not stipulated to furnish any precise amount of freight, and that the specie value of the notes at the time they should have been paid was the rule by which the damages should have been estimated.\*

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\* This case, though it raises some important questions, properly decides nothing as to the amount of damages ; but it may be noticed, as to the latter point, that it is adverse to the decisions of the courts of New York in regard to notes payable in a specific article, it being there held, that if the specific article is not tendered the party loses his privilege and must pay in money. *Supra*, 242, 281-2.

## CHAPTER XIV.

### OF CERTAIN SPECIAL CONTRACTS, AND OF THE ACTION OF COVENANT.

Cases of Contracts not considered in the previous chapters—Damages on Agreements for forbearance—Contractors on Public Works—Misappropriation of Pledges—Cases examined—Forfeiture of Stock by Corporation—Refusal by Corporation to permit transfer of Stock—Damages in suits by Assignees of Bankrupts—Breach of Promise of Marriage—Action of Covenant—Charter Parties—Assignments of Judgments—Leases.

WE have thus examined the measure of relief in the promissory cases of contract, where the damages are in no way liquidated by the parties. Before we approach the consideration of those cases where the compensation is controlled either by a penalty or a more precise stipulation, we have yet to discuss the question of interest, together with some contracts not embraced in the foregoing divisions, as well as the measure of damages in the action of covenant.

Reserving for the next chapter the examination of the subject of interest, we shall here discuss some particular contracts not included in our previous classification, and shall then treat of those cases which are exclusively presented in the action of covenant.

And first, of contracts for forbearance. These contracts are often entered into by creditors for certain considerations on which they forbear to pursue their debtor during a given time. In a case of this kind where the plaintiff had recovered judgment against his debtor, the defendant, in consideration that the plaintiff would forbear to sue out execution for a certain time, agreed to erect a house and lease it to the plaintiff; such erection and lease to be in full satisfaction of the judgment. The agreement not being performed, it was held that the value of the house was the measure of damages, and not the differ-

ence between the amount of the judgment and value of the house.\*

There is another class of cases of not infrequent occurrence, to which incidental reference has already been had,† that of contractors, as they are called, or parties who undertake to construct public works on a large scale, such as railroads, canals, or government buildings. It appears to be settled in regard to this class of agreements, that the contractor is entitled to recover the profits which he has lost by the default of the other party to the undertaking; that in estimating these profits, his sub-contracts are not to be taken as evidence thereof; but that they are to be arrived at by taking the market value at the time of the breach, and if there be no market value, then by a minute inquiry into the cost of materials, the expense of transportation, the amount and value of labor required; and the opinions of witnesses will not be received.‡

Even with these data the estimate of profits must be somewhat conjectural; and in such case it has been said to be the duty of the jury not to assess damages rigorously, but to moderate them so as to make allowance for any partial uncertainty that may exist.§

Where a millwright agreed to put machinery into the plaintiff's mill in a good and workmanlike manner, and he did it so unskillfully that the same was of little or no value, and the plaintiff lost the profit and benefit of his mill for a long space of time, and was obliged to alter the machinery, the plaintiff was

\* *Strutt vs. Farlan*, 16 M. & Wels., 249. See *Ellison vs. Dove*, 8 Blackf., 571, and *supra*, 200.

† *Supra*, 227.

‡ *Masterton vs. Mayor of Brooklyn*, 7 Hill, 62. *Lawrence vs. Wardwell*, 6 Barb. S. C. R., 428. *N. Y. & H. R. R. Co. vs. Story*, 6 Barb. S. C. R., 419. *Clark vs. The Mayor*, 8 Barb. S. C. R., 288. This case was reversed by the Court of Appeals, on the ground that when the contractor elects to consider the contract as rescinded, and brings his action for work and labor generally, he cannot recover for profits on the unexecuted part of the work; and that in such a case the rule of damages is the actual value of what has been done. But the general right to recover the profits which he would have made, where he brings his action for a breach of the agreement, was affirmed. *Clark vs. The Mayor*, 4 Comstock, 388. *Seaton vs. Second Municipality*, 8 La. Ann. R., 45. In Louisiana, a contract made by a partnership as undertakers for the construction of a railroad will be canceled by the death of any of the parties, and the other contracting party is only bound to pay the value of the work already done, and that of the materials already prepared, proportionably to the price agreed on. *McCord vs. the West Feliciana Railroad Company*, 8 La. Ann. R., 285.

§ *Seaton vs. Second Municipality*, 8 La. Ann. R., 45.

held entitled to recover such additional sum, beyond the expense of the repairs, as the mill would have been worth to him if the defendant had fulfilled his contract, more than it was worth while the machinery was insufficient; and the opinions of witnesses may be received. I suppose that in this case the court meant to give the profits of working the mill.\*

We come next to pledges.

Where an article is pledged for a specific object, and the pledgee misappropriates it in violation of the agreement, the remedy furnished by our law is either in an action of assumpsit or covenant, according as the engagement is sealed or unsealed, or in an action of trover. In either case, however, the question turns on the true construction of the contract.

In an early case in New York, the plaintiff's intestate deposited with the defendant a certain depreciation note on the 29th of April, 1786, of the nominal value of \$2,629, to be delivered to the intestate on the payment of \$600 and interest. In 1788, the defendant sold the note for the best price he could get, leaving a small balance still due him. In 1791 or 1792, the intestate died, and the plaintiff as his administrator, in 1799, went to the defendant's house to redeem, but was prevented by his illness from seeing him. The Supreme Court held that the defendant's sale was unauthorized, and that the rule of damages was the value of the certificate at the time of the application to redeem. It would seem, from the language of the opinion, that the note had risen in value between the time of the sale and that of the application. It was insisted in this case, that the measure of damages was a mere question for the jury; but Kent, J., said, "In cases where there is a criterion for an accurate computation, that criterion must be followed, and it becomes then a rule of law. I have no doubt the rule in the present case is a rule of law, and the only examination is to discover it."†

It is matter of inquiry, in a case like this, whether the measure of damages should be the value at the time of conversion, which in *Cortelyou vs. Lansing*, would have been the price

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\* *Clifford vs. Richardson*, 18 Verm., 620.

† *Cortelyou vs. Lansing*, 2 C. C. in Error, 200 and 215. In *Barrow vs. Paxton*, 5 J. R., 258, 260, it is said by Kent, J., that he never delivered this opinion; but it has been frequently recognized as law; *Garlick vs. James*, 12 J. R., 146.

realized at the time of the irregular sale; or the value at the time of the offer to redeem; or yet again, the value at the time of trial. These questions we have already considered,\* and we shall have to examine them again more fully when we come to treat of the action of trover.

In the mean time it may be noticed, that when the mortgagee of real or personal estate takes the thing pledged and sells it, or finally converts it to his own use, he is held to be paid so much only towards his debt as the thing sold for, or was worth, at the time of the conversion.† These, however, are not, like those which we are here considering, cases of misappropriation.

In Massachusetts,‡ where the plaintiff had pledged his brother's note as security for goods to the defendant, and the goods being paid for, but the note not being delivered up, he brought assumpsit on the implied promise contained in the receipt, the jury found a verdict for the plaintiff for the full amount of the note; and the Supreme Court said, "that though they were not bound to give him the nominal amount of the note, yet they were at liberty to do it." With deference, I do not see how the jury could have been at liberty to do otherwise, nor what different criterion could have been adopted. It was certainly no case for them to exercise a vague discretion. The whole amount was due, or nothing.§

The measure of damages in actions brought by incorporated companies against stockholders, upon calls made for payment of stock, furnishes us with another subject of inquiry. Where the defendant subscribed for stock which had been forfeited by the company, it has been held in New York, that the forfeiture was not a bar to the action, but that the nominal value of the stock forfeited, less the actual cash value at the time it was declared forfeited, was the measure of compensation.¶ And un-

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\* *Supra*, 280.

† *Globe Ins. Co. vs. Lansing*, 5 Cow., 880; *Lansing vs. Goelet*, 9 Cow., 846; *Spencer vs. Ex'rs of Hartford*, 4 Wend., 881; *Case vs. Boughton*, 11 Wend., 106.

‡ *Thomas vs. Waterman*, 7 Metcalf, 227.

§ In Massachusetts, *Jarvis vs. Rogers*, 15 Mass., 889, presents an interesting decision as to the measure of damages in the case of misappropriation of pledges. See it cited with approbation in *Stearns vs. Marsh*, 4 Denio., 227.

¶ *Herkimer Man. Co. vs. Small*, 21 Wend., 278.

less the value of the stock reaches the whole debt and interest,\* the plaintiff must have judgment for the balance.

The refusal of corporations to prevent transfers of their stock, presents another interesting question. In New York, where an action was brought† upon the refusal of a bank to permit a transfer of stock on its books, the judge charged that the rule of damages was the highest price that the stock bore at any time after the demand for permission to transfer, and before the commencement of the suit. The defendants contended that the plaintiffs should recover the damages actually sustained, and which they insisted were only the excess of price in the market over the par value which might have been realized upon a sale and transfer. But the Supreme Court said:

"This assumes the plaintiff to be still the owner of the stock. But the defendants have denied this ownership altogether. They possessed the means of preventing its use or enjoyment, and if the plaintiff should now recover only the loss occasioned by his inability to sell in the market, the measure would be obviously incomplete. We are not to assume, in the absence of any change of intention on the part of the bank, that a second application for a transfer would be more successful than the first. Upon this limited measure of damages, the plaintiff might be kept in continual litigation at the volition of the defendants, or be driven to abandon his property."

This case was carried up to the Court of Errors, where the judgment was affirmed, with an intimation that, perhaps the damages should have included the highest price to the day of trial.‡ In England the rule would appear the same. In an early case, a mandamus to compel the Bank to transfer stock was refused by Lord Mansfield, on the ground that an action would lie for complete satisfaction equivalent to specific relief.§

In Massachusetts also, it has been held that the value of the stock at the time of the demand and refusal to transfer, is the true measure of damages.¶ The rule in Massachusetts and in

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\* S. C., 2 Hill, 127.

† Kortright *vs.* Buffalo Commercial Bank, 20 Wend., 91.

‡ The Chancellor, however, delivered a dissenting opinion, both as to the right of the plaintiff and as to the measure of damages. *Comm. Bank of Buffalo vs. Kortright*, 22 Wend., 848.

§ 1 *he King vs. The Bank of England*, Douglass, 528.

¶ *Gray vs. Portland Bank*, 3 Mass. R., 364; *Sargent vs. Franklin Ins. Co.*, 3 Pick., 90.



New York is the same ; but it is proper to notice that, in the one State, the analogy between the measure of compensation in this case and in the action of trover is preserved ; while in the other the analogy of the rule which we have already noticed,\* that in sales of chattels, where the property is paid for, the highest value after the time of trial shall be given, is entirely disregarded. This principle is based upon the idea, that the property of the plaintiff is placed beyond his control by the act of the defendant ; and the refusal to permit a transfer of stock presents a very similar state of things in this respect.

Interesting questions are often presented in suits by assignees seeking to enforce contracts made by the bankrupt. In a case in assumpsit in the English Exchequer, the facts were that the bankrupt had, previous to his bankruptcy, delivered to the defendant a bill of exchange for £600, which he promised to discount, retaining £100 and the discount. He kept the bill, however, and paid nothing to the bankrupt. On this state of facts, the judge who tried the cause told the jury that they were bound to give the £600, less the £100 and the discount. An effort was made to set the verdict aside, on the ground that the cause should have been left to the jury at large, and that the judge erred in telling them, as a *point of law*, that the sum above stated was the measure of damages. But the charge was held right, and the court said : " No doubt all questions of damage are, strictly speaking, for the jury, and however clear and plain may be the rule of law on which the damages are to be found, the act of finding is for them. But there are certain established rules according to which they ought to find ; and here there is a clear rule, that the amount which would have been received if the contract had been kept is the measure of damages if the contract is broken."† The decision is important, as being one of that large class of cases in which the modern determination of the courts to reduce the subject of damages to settled rules is most distinctly visible.

The action for breach of promise of marriage, as has been already said,‡ though nominally an action founded on the breach of an agreement, presents a striking exception to the

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\* Supra, 265.

† Alder vs. Keighley, 15 M. & Wels., 107.

‡ Supra, 212.

general rules which govern contracts. This action is given as an indemnity to the injured party for the loss she has sustained, and has been always held to embrace the injury to the feelings, affections, and wounded pride, as well as the loss of marriage.\* From the nature of the case, it has been found impossible to fix the amount of compensation by any precise rule; and, as in tort, the measure of damages is a question for the sound discretion of the jury in each particular instance,† subject, of course, to the general restriction, that a verdict influenced by prejudice, passion, or corruption, will not be allowed to stand.

Beyond this the power of the court is limited, as in cases of tort, almost exclusively to questions arising on the admissibility of evidence when offered by way of enhancing or mitigating damages. So where it appears that the promise was made by the defendant with a view to seduce the plaintiff, and that the defendant thereby did in fact seduce the plaintiff, this will be allowed to go to the jury in aggravation.‡

So also, it is held that the defendant may show in mitigation of damages, the licentious conduct of the plaintiff, and her general character as to sobriety or virtue, without any limitation of time whatever.§

It is also settled that, in this action, dissolute conduct on the part of the female *after* the promise (or before if unknown), discharges the contract altogether. Indecent conduct *before* the promise if unknown to the defendant, or *after* the promise, goes in mitigation of damages.¶ No evidence can be given of any fact having a tendency to aggravate the damages, which has occurred after the commencement of the suit. So in an action for a breach of promise, an indecent and insulting let-

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\* Wells *vs.* Padgett, 8 Barb. S. C. R., 323.

† Southard *vs.* Rexford, 6 Cowen, 254.

‡ Paul *vs.* Frazer, 3 Mass., 73. Green *vs.* Spencer, 3 Miss., 318. Hill *vs.* Maupin, id., 323. Buck *vs.* Strain, 2 Bibb., 341. Whalen *vs.* Layman, 2 Blackf., 194. Wells *vs.* Padgett, 8 Barb. S. C. R., 323. The contrary has been held in Pennsylvania; Weaver *vs.* Bechert, 2 Barr., 80. But there the improper, cruel, and indecent conduct of the defendant will go to aggravate the damages. Baldy *vs.* Stratton, 11 Penn. R., 316.

§ Johnson *vs.* Caulkins, 1 J. C., 116.

¶ Boynton *vs.* Kellogg, 3 Mass., 189. Willard *vs.* Hone, 7 Cowen, 32. Palmer *vs.* Andrews, 7 Wend., 142. Irving *vs.* Greenwood, 11 E. C. L., 413. Capehart *vs.* Caradine, 4 Strobhart, 42.

ter written by defendant to the plaintiff after suit brought, cannot be proved.\*

In regard to the hire of slaves, it has been held in Arkansas, as the value of slave hire fluctuates, that in an action for the hire of slaves for one year it is erroneous to instruct the jury that what the defendant paid the year previous is the correct criterion of their value, and that what such slaves hired for during the year in controversy would be the measure of relief.† Where slaves are hired for a specific time and die within the period, but without fault of the hirer, the better opinion seems to be that the hirer is only liable for the time up to the negro's death,‡ though a contrary opinion has been in one case intimated.

Having thus disposed of the great action of assumpsit, we now turn to those cases which are embraced in that of covenant. This is the remedy provided by our jurisprudence for the recovery of damages upon the breach of a covenant, or contract under seal. The addition of a seal to the signature of the contracting parties is pregnant with important consequences, both in regard to the form of the action, and in many instances to the substantial rights of the parties; but it has no effect whatever on the *rule of damages*, except in regard to that class of cases embracing real covenants, which we have already considered. If the contract relate to personal property, the measure of damages is the same whether it be sealed or unsealed, and, consequently, whether the remedy be by covenant or assumpsit.

The questions, therefore, that present themselves in actions of covenant, are usually identical with those which we have been considering in assumpsit. There are cases, however, com-

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\* *Greenleaf vs. McColey*, 14 N. H., 304. But in seduction, where the child was born after the action was commenced, damages were given for the expense consequent thereon. *Stiles vs. Telford*, 10 Wend., 388. In the one case, however, the court took into view what was the direct and natural result of the illegal act. In the other it excluded the consideration of a new tort wholly distinct and independent from the original cause of action.

† *Adamson vs. Adamson*, 4 English, 26.

‡ In Virginia, *George vs. Elliot*, 2 Hen. & Munf., 6. In North Carolina, *Williams vs. Holcomb*, 1 N. C. L. R., 365. In South Carolina, *Bacot vs. Parnell*, 2 Baffey, 424; and in Arkansas, *Collins vs. Woodruff*, 4 English, 468. But in Kentucky they have held the owner liable for the whole term; *Harrison vs. Murrell*, 5 Mon., 359. *Redding vs. Hall*, 1 Bibb., 536.

ing up in this form of action, which cannot arise in any other, inasmuch as the instruments out of which they grow are always executed under seal. Such are assignments of judgments, charter parties, and leases for terms of years.

In the case of an assignment of a judgment containing a warranty that the sum specified remained due and unpaid, when in fact no judgment had ever been entered up, the Supreme Court of New York held, in an action of covenant, that the measure of damages was not the amount recovered as stated in the assignment of the judgment, but the amount of property owned by the judgment debtor, and which might have been taken in execution intermediate the time of assignment and the commencement of the suit.\*

It is worthy of notice here, that the amount of consideration or value paid did not appear on the face of the assignment, and that it is not stated in the report whether the evidence in regard to the amount of property owned by the alleged judgment debtor came from the plaintiff or defendant; although, as the declaration is stated to have averred that the plaintiff had property enough to satisfy the demand, the pleader seems to have thought that, regularly, it should have come from the plaintiff. It would seem that, *prima facie*, either the amount appearing to have been paid for the judgment, or the amount recovered by it, should be the measure of damages. If the analogy of conveyances of real estate were followed, then the consideration paid would govern. If the assignment were treated as a chattel, then the price paid would again be the rule, subject to the plaintiff's right to show that the whole amount could have been recovered, and then for its value beyond the price; and also subject to the further right of the defendant to show that, owing to the judgment debtor's insolvency, it was worthless. If the analogy in the case of sheriffs were adopted, then the amount recovered by the judgment would be the *prima facie* measure, subject to the defendant's right to reduce the sum by showing that, owing to the judgment debtor's circumstances, its whole amount could not be collected.

I make these remarks as serving to illustrate the contradictions and perplexity that pervade the whole subject; indeed,

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\* Jansen vs. Ball, 6 Cow., 628.

we are sometimes induced to say, with Huberus, "*valde lubrica est hujus rei praxis, et tantum non arbitraria.*"\*

Charter parties also being under seal, are to be included under this head; and we have already considered the measure of damages in actions of this kind.†

Leases, being also usually sealed instruments, generally find their appropriate remedy in this action; but the measure of damages in these cases has been already partially discussed elsewhere.‡

Having thus examined the rules of damages in actions on contracts where the measure of remuneration is not fixed by the parties, we shall, after treating of the subject of interest, turn to those cases where, either by a penalty or by a more precise stipulation, the parties endeavor to determine the amount of compensation which shall be recoverable on a breach of the agreement.

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\* Huber. Præl. Jur., lib. 22, tit. 1, Vol. III., 89.

† Wheelwright vs. Beers, 2 Hall, 382 and 391. Supra, 357.

‡ Supra, 196.

## CHAPTER XV.

### OF INTEREST WITH REFERENCE TO DAMAGES.

Interest first given in England by Statute—When allowed as matter of Law—When by the Jury in their discretion—Allowed where a principal sum is to be paid at a fixed time—Where an agreement can be inferred—Not allowed where the demand is unliquidated—Conflict between English and American decisions—Money improperly detained—Cash advances—Special Cases—Compound Interest—Cash advances—Discretion of the Jury—In Trover and Trespass—Interest on Error—On Judgment—When Principal has been paid.

BEFORE taking leave of those contracts in which the damages are unliquidated, we have to examine the cases in which interest is allowed as damages. We have already seen\* that in actions brought on promises to pay a liquidated sum of money, as on promissory notes or bills, where no question arises as to the currency or rate of exchange, the rule of damages is fixed and arbitrary, being identical with the rate of legal interest. We are now considering a different and more complex class of agreements. In these, the question of interest often depends on the true construction of the contract, or the just inference to be drawn from the evidence as to the intention of the parties; and when this is the case it does not properly come within the scope of this treatise. The allowance or infliction of interest often, however, presents itself entirely disconnected from any question of contract; and in this aspect the subject cannot be omitted in any work which treats of compensation; for it is to be observed generally, to use the language of Lord Kenyon,† “that where interest is intended to be given, it forms part of the damages assessed by the jury, or by those who are substituted in their place by the parties.”‡

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\* Supra, Ch. VIII., 233.

† Lee vs. Lingard, 1 East, 401.

‡ And so says Huberus, “*Explicata est pars prima Rubricæ de usuris, quibus admo-*

We have already had occasion to notice that interest was originally introduced into English jurisprudence by statutory provision.\* "Before the statute of Henry VIII.,"† says Lord Mansfield,‡ "all interest on money lent was prohibited by the common law, as it is now in Roman Catholic countries."§ This statute provided that none should take for any loan or commodity above the rate of ten pounds for one hundred pounds for one whole year, which rate was reduced to five per cent. by a subsequent act.]

The subject of interest is susceptible of a very clearly defined division; *first*, where it can be claimed as a right, either because there is an express contract to pay it, or because it is recoverable as damages which the party is legally bound to pay for the detention of money or property improperly withheld; ¶ *second*, where it is imposed to punish negligent, tortious, or fraudulent conduct. In the first case it is recoverable as matter of law. In the second case it rests entirely in the pleasure of the jury.

Where a principal sum is to be paid at a specific time, the English law has always since the above statute, implied an agreement to make good the loss arising from a default, by the payment of interest. This was expressly said,\*\* by Lord Mansfield, in an early case :

"Where money is made payable by an agreement between parties, and a time given for the payment of it, this is a contract to *pay the money at a given time, and to pay interest for it from the given day in case of failure of payment at that day*. So that the action is, in effect, brought to obtain a specific performance of the contract. For pecuniary damages, as upon a contract for the payment of money, are from the nature of the thing, a specific performance, and the relief is defective so far as all the money is not paid."

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*dum affins esse id quod INTEREST aliquoties intelligimus."* Huber. Præl. Jur., Vol. III., 88, § 80.

\* Supra, Chap. VIII.

† 27 H. VIII., c. 9.

‡ In *Lowe vs. Waller*, Douglass, 786 and 740.

§ This conclusion, notwithstanding a contrary dictum of Lord Hale, [*Hard. Rep.*, 420], is arrived at by Mr. Senator Spencer, in his very able dissenting opinion in *The Bena. Glass Factory vs. Reid*, 5 Cowen, 587 and 604, hereafter cited.

¶ 12 Anne, Stat. 2, c. 16.

¶ *Abbott vs. Wilmot*, 22 Verm., 437.

\*\* *Robinson vs. Bland*, 2 Burr., 1077 and 1086, (1760).

And Lord Thurlow said,\* "All contracts to pay undoubtedly give a right to interest from the time when the principal ought to be paid." This language has been cited with approbation in this country.†

In these cases the interest computed at the legal rate, becomes the fixed measure of damages, to which the plaintiff is entitled as of right, as on a bill or note for instance, the refusal of which would be error, and no more than which can be recovered.‡ Lord Mansfield extended the principle further than it had been carried before his time, holding that in such actions interest should be computed to the time of the verdict, instead of, as had been previously practiced, to the commencement of the suit.§

But where money is due, without any definite time of payment, and there is no contract, express or implied, that interest shall be paid, the English rule, independent of statute, is, that it cannot be claimed. In the Common Pleas,|| it was early said, that in an action for money had and received, the plaintiff could recover nothing but the net sum, without interest. In the King's Bench,¶ Lord Ellenborough said, "Lord Mansfield sat here for upwards of 30 years, Lord Kenyon for above 13 years, and I have now sat here for more than 9 years; and during this long course of time, no case has occurred, where, upon a mere simple contract of lending, without an agreement for payment of the principal at a certain time, or for interest to run immediately, or under special circumstances from whence a contract for interest was to be inferred, interest has ever been given." The interest here claimed, was on money lent.\*\* In a subsequent case,†† Abbott, C. J., said: "It is now established as a general principle, that interest is allowed by law only upon mercantile securities, or in those cases where there has been

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\* *Boddam vs. Riley*, 2 Bro. C. C., 8.

† *Williams vs. Sherman*, 7 Wend., 109.

‡ *Supra*, 288, *supra*, of Bills and Notes.

§ *Robinson vs. Bland*, 2 Burr., 1077, 1086. In New York, interest accruing in cases of contract, subsequent to the verdict, is taxed with the costs, but not in cases of tort. 2 R. S., 864, § 9. *Henning vs. Van Tyne*, 19 Wendell, 101.

| *Walker vs. Constable*, 1 Bos. & Pul., 306, and *Tappenden vs. Randall*, 2 B. & P., 472.

¶ *Calton vs. Bragg*, 15 East, 228, (1813).

\*\* See, also, *Arnott vs. Redfern*, 3 Bing., 358.

†† *Higgins vs. Sargent*, 2 B. & Cres., 348.



an express promise to pay interest, or where such promise is implied from the usage of trade or other circumstances." The rule here laid down has been, as we shall see, a good deal modified in this country; but the English courts have adhered to the doctrine with considerable rigor. Thus they have refused interest where property has been unjustly detained, or payment improperly refused, even in cases of fraud; Lord Ellenborough\* saying, that the fraud did not take this case out of the rule which he had previously laid down,† that there must be an agreement, express or implied; and the same principle was afterwards adhered to.‡

But a surety who is indemnified against all loss by his principal, and who is compelled to pay the debt of his principal, is entitled to interest on the amount so paid, though interest was not expressly mentioned in the contract between them, and though there was not any demand of interest, and though the claim in respect thereof was not made till many years after payment.§

It is well settled in the United States, that an agreement to pay interest may be inferred from usage. Thus, in New York,¶ interest has been allowed on the account of a forwarding merchant, on the ground of a universal custom to charge interest

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\* *Crookford vs. Winter*, 1 Camp., 129.

† *De Havilland vs. Bowerbank*, 1 Camp., 50.

‡ *Bernaes vs. Fuller*, 2 Camp., 426. The English Courts do not appear to have in any way departed from the rule of *Bernaes vs. Fuller*, and *De Havilland vs. Bowerbank*; see *Fruhling vs. Schroeder*, 2 Bing. N. C., 77; but in a large class of cases a different rule has been introduced by statute. The 3 and 4 Will. 4, c. 42, 88, declares, "that upon all debts or sums certain, payable at a certain time, or otherwise, the jury on the trial of any issue, or on any inquisition of damages, *may if they shall think fit*, allow interest to the creditor, at a rate not exceeding the current rate of interest from the time when said debts or sums were payable, if such debts or sums be payable by virtue of some written instrument at a certain time, or if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the time of payment, provided that interest shall be payable in all cases in which it is now payable in law." This statutory regulation recognizes the hardship of the old rule, but leaves the matter in great uncertainty, the whole thing being given to the discretion of a jury in the particular case. As to this statute, see *Davis vs. Smyth*, 8 Mees. & Wel., 899, an action of debt for goods sold and delivered. It was found that the defendant had agreed, at the time of the contract, to give a bill or note for the price. The jury gave interest, and it was held right. And see, also, *Harper vs. Williams*, 4 Q. B., 219.

§ *Petre vs. Duncombe*, 15 Jur., 86.

¶ *Meech vs. Smith*, 7 Wend., 315.

on such accounts, the custom being known to the defendant; and Savage, C. J., said: "Interest is always properly chargeable when there is either an express or an implied agreement to pay it."\*

It is also a general rule, that interest is not recoverable on unliquidated demands. In† an action for not delivering teas according to agreement, Judge Washington, at nisi prius, said, "It is not agreeable to legal principles to allow interest on unliquidated or contested claims in damages." "The rule is well settled," says Parker, J., in the Supreme Court of New York, "that interest is not recoverable on running or unliquidated accounts, unless there is an agreement, either express or implied, to pay interest."‡ So in Massachusetts, it is said, "that interest cannot be recovered upon an open and running account for work and labor, goods sold, and the like, unless there is some contract to pay interest, or some usage, as in the case of the custom of merchants, from which a contract may be inferred."§ And so also in Texas, interest is denied on an open account.¶ So, in an action on a policy of insurance, if the preliminary proofs are so vague that the claim cannot be computed, interest is not allowable.¶ On the other hand, on liquidated amounts, interest is recoverable; as, when accounts are stated between the parties, or rendered, and not dissented from.\*\*

We have seen above, that in England, interest has been refused, even where fraud is practiced by the defendant,†† but this is not the American rule. In an early case, the English cases were reviewed at length by the Supreme Court of the State of New York, and their principle was disapproved of.

\* See, also, *S. P. Reab vs. M'Allister*, 8 Wend., 109.

† *Gilpin vs. Consequa, Peters'* C. C. R., 85.

‡ *Easterly vs. Cole*, 1 Barb. S. C. Rep., 285. See, also, *Newell vs. Griswold*, 6 J. R., 45. *Trotter vs. Grant*, 2 Wend., 418. *Wood vs. Hickok*, 2 Wend., 501. *McKnight vs. Dunlop*, 4 Barb. S. C. R., 86.

§ *Hunt vs. Nevers*, 15 Pick., 500. *Goff vs. Inhab. of Rehoboth*, 2 Cush., 475.

¶ *Cloud vs. Smith*, 1 Texas, 103.

¶ *McLoughlin vs. Washington Ins. Co.*, 23 Wend., 525. But in an early case, it was held, that though interest is not strictly recoverable as of right on a partial loss under a policy of insurance, still the jury may give it if they think proper. *Anon.*, 1 J. R., 315.

\*\* *Walden vs. Sherburne*, 15 J. R., 409.

†† *Supra*, 376.

When money is received by a party who, improperly detains it, or converts it to his own use, he must with us pay interest.\* So when money has been improperly withheld by a public officer, as where a sheriff retains money after the return day of the execution, he is liable for interest.† So a party receiving money belonging to another, and refusing to pay it over, is chargeable with interest, although he has a set-off and the precise amount due from him is not liquidated previous to the commencement of the suit.‡

So in Vermont, where the defendant had made a gross and fraudulent misapplication of funds, he was held rightly chargeable with interest, and the jury were so instructed.§ And the rule in Pennsylvania is the same.|| In Massachusetts also, it has been held, that where the defendant in an action for money had and received, has fraudulently obtained or wrongfully detained the plaintiff's money, he is chargeable with interest from the time of his so obtaining or detaining the same.¶ In a more recent case in that State it has been held, where an agent, although acting in good faith, unreasonably neglected to inform his principal of the receipt of money, that he was liable for interest; and it was then generally intimated, that when the payment of money due is withheld unlawfully and against right, the law will allow interest.\*\*

But in the same State it is held, that where money is payable on demand, and there is no contract or usage to pay interest, and the defendant is not a wrongdoer in acquiring or detaining it, interest is to be computed from the service of the writ only.††

In many cases, an express demand is necessary. So, an

\* *People vs. Gasherie*, 9 J. R., 71. *Lynch vs. De Vlar*, 3 J. C., 303.

† *Slingerland vs. Sweet*, 18 J. R., 255. *Crane vs. Dygert*, 4 Wend., 675.

‡ *Greenly vs. Hopkins*, 10 Wend., 96.

§ *Crane vs. Thayer*, 18 Verm., 162.

|| *Commonwealth vs. Crevor*, 8 Binn., 121 and 123.

¶ *Wood vs. Robbins*, 11 Mass., 504. *Goff vs. Inhab. of Rehoboth*, 2 Cush., 475.

*Hubbard et al. vs. Charleston Branch R. R. Co.*, 11 Met., 124.

\*\* *Dodge vs. Perkins*, 9 Pick., 363.

†† *Hunt vs. Nevers*, 15 Pick., 500. See, also, *Brewer vs. Tyringham*, 12 Pick., 547. *Haven vs. Foster*, 9 Pick., 112. As to interest against executors, *Dawes vs. Winship*, 5 Pick., 97. *Parker vs. Thompson*, 3 Pick., 429. *Hubbard et al. vs. Charleston R. R. Co.*, 11 Met., 124.

attorney who has advised his principal, is not liable till demand, unless expressly directed to remit.\*

In North Carolina, after stating the English rule, the court said: "Our decisions have extended the rule, and for money lent, or money paid, or had and received, or due on an account stated, the jury ought to be instructed to allow interest, the promise to pay it being implied from the nature of the transaction." But in the case in which this language was held, the court refused to allow it on the award of arbitrators.†

In a case in which a man covenanted to convey lands without fraud, and it afterwards appeared that in truth he had no title to the land, it has been held in Virginia, that whether the jury should allow interest on the value of the land from the date of the contract must depend on the circumstances of the case, of which they are the proper judges; and that it is competent to the defendant to give in evidence any circumstance tending to show that interest should not be allowed.‡ This distinction between a party withholding money due in good faith, or otherwise, presents the question which we have heretofore considered—whether it is proper in an action of contract, under the forms of our law, to raise an issue which is strictly one of tort. And I refer the learned reader to the discussion of that question which has already been had.§

In South Carolina the rule above stated appears to be adhered to, interest being denied on accounts for work done, or goods sold and delivered, or any other open accounts, although the money is withheld after the time of payment is past.¶

There is considerable conflict and contradiction between the English and American cases on this subject; but as a general thing it may be said that while the tribunals of the former country restrict themselves generally to those cases where an agreement to pay interest can be proved or inferred, the courts of the United States, on the other hand, have shown themselves more liberally disposed, making the allowance of interest more

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\* *Williams vs. Storrs*, 6 J. Ch. R., 358.

† *Devereux vs. Burgwin*, 11 Iredell, 491.

‡ *Letcher vs. Woodson*, 1 Brook. C. C. R., 212.

§ *Supra*, 207, et seq.

¶ *Knight vs. Mitchell*, 2 Tread., 668. *Goodard vs. Bulow*, 1 Nott & McCord, 44; and *Ferrand vs. Bouchell*, Harper's Rep., 88.

nearly to depend on the equity of the case, and not requiring either an express or implied promise to sustain the claim.\*

In a case in New York,† the whole subject was much discussed by the courts of that State, and the English and American decisions reviewed at length. It was an action brought by an agent to recover for cash advances and salary. And Savage, C. J., said:‡ “From an examination of the cases, it seems that interest is allowed—*First*, upon a special agreement. *Second*, upon an implied promise to pay it, and this may arise from usage between the parties, or usage of a particular trade. *Third*, where money is withheld against the will of the owner. *Fourth*, by way of punishment for any illegal conversion or use of another's property. *Fifth*, upon advances of cash.”§ And in the principal case, interest was allowed upon a running account of cash advances, without any liquidation of the account or promise to pay. It was denied, however, on the agent's claim for salary; and it seems to be the general rule, that, subject to the qualifications above laid down, it will not be allowed for goods or labor.]

It has been decided, however, that interest is allowable from the time of suit brought for the recovery of an amount due for work under a special contract,¶ unless the testimony offered by way of abatement, mitigation, or recoupment, makes the principal debt stand open for liquidation.\*\*

\* For an examination of the English and American decisions, see Wood et al. vs. Robins, 11 Mass., 504, and Pope vs. Barrett, 1 Mason, 117, in which latter case it was held by Mr. J. Story, that interest was due when money was improperly withheld after demand.

† Reid vs. The Rensselaer Glass Factory, 3 Cowen, 393; and in Error, 5 Cowen, 537; and the whole subject has been again recently reviewed by Willard, J., in Van Rensselaer vs. Jones, 2 Barb. S. C. R., 643, where an able opinion will be found, collecting and commenting upon the cases.

‡ 3 Cowen, 436.

§ This same point, that interest was chargeable on cash advances, had previously been decided, in an early case in New York, Liotard vs. Graves, 3 Caines, 226.

] Doyle's Adm'rs vs. St. James' Church, 7 Wend., 178. Tucker vs. Ives, 6 Cowen, 193. Kane vs. Smith, 12 J. R., 156. Van Beuren vs. Van Gaasbeek, 4 Cowen, 496.

¶ Feeter vs. Heath, 11 Wend., 478.

\*\* Still vs. Hall, 20 Wend., 51.

The subject was examined at an early day in Connecticut, and the following propositions declared:

1. Interest will be allowed when there is an express contract to pay it.
2. Such contract may be inferred from usage, special or general.

It has been held in Massachusetts,\* that in an action for money paid interest is recoverable from the time of payment, without proof of a demand of payment. But as between principal and agent, the general rule is that, in the absence of any contract, or custom which may be evidence of contract, a factor is not liable for interest until he is in some default.†

On the Rhode Island circuit,‡ Story, J., sitting in equity, held, that an administrator is not liable to pay interest on assets in his hands, unless under special circumstances; saying, also, "interest is not allowed on partnership accounts, generally, until after a balance is struck, or a settlement between the parties, unless the parties have otherwise agreed or acted in the partnership concerns." In New Hampshire, in assumpsit for goods sold and delivered, it is held that the jury should allow interest, by way of damages for the detention of the debt, upon the amount they find due from the time of a demand of payment, if one be proved, or, if there be no demand, from the commencement of the suit.§

In an action of covenant to recover rent, it has been held in New York that the plaintiff was entitled to interest, it being for a sum certain, and payable in money.¶ It was originally held that it could not be recovered where the rent was payable in wheat.¶ But this is now settled the other way; and in a case where the rent was payable in wheat and services, the Court of Appeals of New York held this language: "Whenever

3. Where there is a contract to pay money on a day certain, and the agreement is broken, interest will be allowed by way of damages, as on notes, &c.

4. Where goods are sold to be paid for on a day certain, interest in like manner follows.

5. Where money is received for the use of another, and there is neglect in not paying it, interest follows.

6. Where money is obtained by fraud, interest is allowed.

7. When an account is liquidated and balance ascertained, interest begins to run.

8. Where goods are delivered to be paid for, not at a day certain but in a reasonable time, and there is unreasonable delay, interest is allowed.

9. But where there are current accounts founded on mutual dealings, and no promise to pay interest, interest will not be allowed. *Selleck vs. French*, 1 Conn., 82.

\* *Haley vs. Jewett*, 2 Met., 168.

† *Ellery vs. Cunningham*, 1 Met., 112.

‡ *Dexter vs. Arnold*, 3 Mason, 284.

§ *Mellvalne vs. Williams*, 12 N. H., 474.

¶ *Clark vs. Barlow*, 4 J. R., 168. So, too, in Kentucky, *Burnham vs. Best*, 10 B. Monroe, 227.

¶ *Van Rensselaer's Executors vs. Palmer's Adm'rs*, 1 J. R., 276.

a debtor is in default for not paying money, delivering property, or rendering services in pursuance of his contract, justice requires that he should indemnify the creditor for the wrong which has been done him; and a just indemnity, though it may sometimes be more, can never be less than the specified amount of money or the value of the property or services at the time they should have been paid or rendered, with interest from the time of the default until the obligation is discharged. And if the creditor is obliged to resort to the court to redress, he ought in all such cases to recover interest, in addition to the debt, by way of damages. It is true that on an agreement like the one under consideration, the amount of the debt can only be ascertained by an inquiry concerning the value of the property and services; but the value can be ascertained, and when that has been done, the creditor, as a question of principle, is just as plainly entitled to interest after the default as he would be if the like sum had been payable in money.\*

It has been said by Mr. Justice Story, on the Massachusetts circuit, that in claims for wages interest is generally allowed from the time of a demand made, and this both at common law and in the admiralty.† It seems a general principle, that a mortgagee in possession is not to pay interest on rents unless there are special circumstances rendering it equitable that he should do so.‡

Interest is not recoverable on a bill of official fees, unless there has been a regular taxation.§

The State is liable to pay interest upon the amount of a legal appraisal of damages for land taken for public use, after demand made.||

In Virginia, without deciding as a general rule whether interest can properly be allowed upon the arrears of an annuity, it has been held that, under the circumstances of the case, where the annuity was to be paid in pork and corn delivered at a par-

\* *Van Rensselaer vs. Jewett*, 5 Denio, 186, and 2 Comstock, 135. See, also, an able opinion of Willard, J., in *Van Rensselaer vs. Jones*, 2 Barb. S. C. R., 642, where the whole subject is examined.

† *Gammell vs. Skinner*, 2 Gallison, 45.

‡ *Breckenridge vs. Brooks*, 2 A. R. Marsh, 841; *Story vs. Livingston*, 18 Peters, 359.

§ *Mumford vs. Hawkins*, 5 Denio, 355.

|| *People vs. Canal Commissioners*, 5 Denio, 401.

ticular place, the value of which was to be ascertained by testimony, and in the absence of any satisfactory proof of a demand at the place where it was to be paid, or of an agreement to dispense with such demand and convert it into money, no interest should have been allowed on the arrears.\*

The leading difference between the American and English cases on this subject seems to grow out of a different consideration of the nature of money. The American cases look upon the interest as the necessary incident, the natural growth of the money, and therefore incline to give it with the principal; while the English treat it as something distinct and independent, and only to be had by virtue of some positive agreement.†

Before quitting the consideration of those cases in which the allowance of interest is entirely under the control of the court, we must consider the subject of compound interest, and the practice of annual rests in mercantile accounts. In regard to compound interest, or interest on interest, there has existed much doubt and difference of opinion. It was rigorously prohibited by the Roman law: *Nullo modo usurae usurarum a debitoribus exigantur*.‡ The English law followed in the same track. So in an early case in Chancery, Lord Cowper held a clause in a mortgage, that if the interest was behind six months then it should be accounted principal and compound interest, was "void and of no use;" "that to make interest principal it is requisite that it be grown due, and then an agreement concerning it may make it principal."§ It is not regarded as within the statutory prohibition of usury, but as leading to oppression and abuse. So Lord Eldon has said, "There is nothing unfair or perhaps illegal in taking a covenant, originally, that if interest is not paid at the end of the year it shall be converted into principal. But this court will not permit that, as tending to usury, though it is not usury."||

The cases were reviewed at length by Chancellor Kent, in an early case in New York, and it was said, "The cases and language in the books are clear in acknowledging the rule that

\* *Phillips vs. Williams*, 5 Grattan, 259.

† See the subject discussed, and the cases collected and cited in Alabama, in *Boyd vs. Gilchrist*, 15 Ala., 849.

‡ Cod., 4, 82, 38.

§ *Lord Ossulton vs. Lord Tamworth*, 2 Salk., 449.

|| *Chambers vs. Goldwin*, 9 Vesey, 271.



even an agreement, made at the time of the original contract, to allow interest upon interest as it should become due is not to be supported ;"\* and he placed the objection to the provision on the ground of its harsh and oppressive character. Again in a subsequent case, the same learned judge laid down the rule that "*compound interest cannot be demanded and taken, except upon a special agreement made after the interest has become due* ;"† and the general principle has been again and still more recently re-declared.‡ In this case it was said, however, that if compound interest be voluntarily paid, it cannot be recovered back.§ So in ascertaining the amount due on a note made payable with interest annually, simple interest only is to be computed ;|| and interest on the interest will not be allowed.¶ But if a new note is given for the interest, it is thereby converted into capital, and it may be given with interest.\*\*

An exception has been, however, introduced by the usages of modern trade to the general rule which denies compound interest. As between merchants upon their mutual accounts it is the custom to cast interest upon the several items, and to strike a balance at the end of the year of the items of principal and those of interest, and to carry the footing of the two to a new account as forming the first item of principal for the ensuing year. In this manner, yearly rests, as they are called, have for a long time been made and acquiesced in by the mercantile world.†† But after the mutual trade and dealings have ceased, the right to make annual rests ceases ; and in the absence of any

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\* *Connecticut vs. Jackson*, 1 J. Ch. R., 18.

† *Van Benschoten vs. Lawson*, 6 J. Ch. R., 818.

‡ *Mowry vs. Bishop*, 5 Paige, 98.

§ See, also, as to demand of compound interest, *Von Hemert vs. Porter*, 11 Met., 210. In Connecticut, a contract for the payment of compound interest, made before interest has accrued, is to that extent void, and will not, unless in special cases, be enforced either in law or in equity. *Camp vs. Bates*, 11 Conn., 487. *Rose vs. City of Bridgeport*, 17 Conn., 248. In Louisiana compound interest is prohibited by the code, "Interest upon interest cannot be recovered, unless it be added to the principal and by another contract made a new debt. No stipulation to that effect in the original contract is valid."—Art. 1984. The whole subject of interest is codified in that State. In Indiana, see *Miles vs. Board of Com'rs*, 8 Blatchford, 158.

|| *Hastings vs. Wiswall*, 8 Mass., 455. *Dean vs. Williams*, 17 Mass., 417. *Von Hemert vs. Porter*, 11 Met., 210. *Doe vs. Warren*, 7 Greenl., 48.

¶ *Ferry vs. Ferry*, 2 Cush., 98.

\*\* *Wilcox vs. Howland*, 28 Pick., 167.

†† *Eaton vs. Bell*, 5 B. & Ald., 84. *Stoughton vs. Lynch*, 2 J. Ch., 214. *Barclay vs. Kennedy*, 8 Wash. C. C., 350. *Von Hemert vs. Porter*, 11 Met., 210.

specific agreement, the creditor is allowed simple interest only on the balance of his account; the right to make the yearly rests growing out of the mutuality of the debts and credits and the allowing of interest on each side.\*

Another exception to the general rule denying compound interest, grows out of the conduct of the defendant; where that is grossly delinquent or intentionally contrary to his duty, compound interest is sometimes inflicted by way of punishment.† Where partial payments have been made in cash, or by rents and profits, or otherwise, the payments are to be first applied to the satisfaction of the interest then due, and the balance only is to go towards the reduction of the principal.‡

In the cases which we have been considering, interest is, as we have seen, a matter resting in the control of the court, and allowed or disallowed upon certain rules of law. In these it is said to be given *as interest*; we have now to consider a class of cases where it is to be settled by the verdict of the jury, as we have already seen intimated; and here it is given more strictly as damages.

"There are two classes of cases," says the Supreme Court of New Hampshire, "in which interest may be recovered. The first is where it is incident to the debt, founded on the agreement of the parties, and is a legal claim, and the court are bound to allow it. The other class is where the interest may be allowed by a jury in the nature of damages."§

This is generally so in actions of *tort*, as trover or trespass for taking goods, where interest is allowed at the discretion of the jury. So in an action of trespass, the Supreme Court of New York said, "The plaintiff ought not to be deprived of his property for years without compensation for the loss of the use of it; and the jury had a discretion to allow interest in this case as damages. It has been allowed in actions of trover, and

\* Denniston *vs.* Imbree, 8 Wash. C. C., 401. Von Hemert *vs.* Porter, 11 Met., 210.

† 1 Vesey, 92; Hopkins *R.*, 424. Ackerman *vs.* Emmett, 4 Barb. S. C. R., 626.

‡ Dean *vs.* Williams, 17 Mass., 417. Fay *vs.* Bradley, 1 Pick., 167. Reed *vs.* Reed, 10 Pick., 398. In New Hampshire it was said, in an early case (1818), that on a note payable with interest annually, interest at the rate of six per cent. per annum should be cast on the principal, and interest on the annual interest in the nature of damages, for its detention from the time it became payable. Pierce *vs.* Rowe, 1 N. H., 179. I do not know if this has been adhered to in that State; it is certainly not the general rule.

§ Mollvaine *vs.* Williams, 12 N. H. R., 475.

the same rule applies in trespass when brought for the recovery of property."\* So in Kentucky, in case of a fraudulent refusal to convey land.† And so declared also in North Carolina in cases of trover and trespass.‡

In Louisiana, it has been said that the allowance of interest as damages, *ex delicto*, from the date of the act complained of, is unauthorized by law.§ This is certainly adverse to the general current of our authorities; and, as it appears to me, to the better reason of the matter; for if the jury are to have any discretion at all in such cases, it could hardly be refused them in regard to the allowance of interest.

The discretionary rule has been applied in many cases of contract. So in an action on an agreement to deliver wheat, the value of the wheat with interest thereon was given.¶ And the Supreme Court on the argument of the case said, "The judge who tried the cause did not *direct the jury* to allow interest on the sum which they should find the wheat to be worth after the demand; but in ascertaining the plaintiff's damages, he observed that they *might if they thought proper*, from the nature of the transaction, include interest as an item in making up the amount of damages. There was not in this remark any direction contrary to law."

"Interest," said Washington, J., on the Pennsylvania circuit, "is a question generally in the discretion of a jury."¶

So, in two actions against the master of a ship for the non-delivery of goods, it was held in New York, that the jury might give damages if the conduct of the defendant was improper, *i. e.*, where fraud or gross misconduct could be imputed to him; but it appearing that such was not the fact, it was not allowed, and the court in the former case said, "Interest is not in every case and of course recoverable, because the amount of the loss is unliquidated, and sounds in damages to be assessed by the jury."\*\*

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\* *Beals vs. Guernsey*, 8 J. R., 446. So in trover, *Hyde vs. Stone*, 7 Wend., 854; *Bissel vs. Hopkins*, 4 Cow., 58; *Kennedy vs. Strong*, 14 J. R., 128; *Hallett vs. Novion*, 14 J. R., 278, and 16 J. R., 327. And in replevin, *Rowley vs. Gibbs*, 14 J. R., 385. So in case for negligence, *Thomas vs. Weed*, 14 J. R., 255.

† *Handley vs. Chambers*, 1 Littell's R., 358. *Supra*, 187.

‡ *Devereux vs. Burgwinn*, 11 Iredell, 490.

§ *Green vs. Garcia*, 8 La. Ann. R., 702.

¶ *Dox et al. vs. Dey*, 8 Wend., 356.

¶ *Gilpins vs. Consequa*, Peters C. C. R., 86. *Willing vs. Consequa*, *ibid.*, 172.

\*\* *Watkinson vs. Laughton*, 8 J. R., 218; and *Amory vs. McGregor*, 15 J. R., 24.

In the action of debt, interest is given, as we shall see, in some cases. But as a general rule it must be separately assessed, as damages for its detention.\* In England, where a statute authorized a dock company to bring debt for calls of payments to be made on the shares of the company, interest not having been included as part of the money due for calls, and not being declared on in a separate count, but having been allowed by the jury, it was held that they might rightly give it; and Tindal, C. J., said, "When the act of Parliament gives the action of debt, it gives all that by the common law is incident to that form of action, viz., damages for the detention of the debt."† But Maule, J., concurring with the Chief Justice, said, "The statute is perfectly clear as to what shall be stated in the declaration; and under that statement interest will form part of the debt to be recovered."‡

In a case where the declaration stated that, on the 15th of June, 1832, the defendant covenanted to pay the plaintiff £270, with interest, on the 15th of December then next, and that there was due the said sum of £270 and interest, in all £300, it concluded to the plaintiffs damage of £10. But the judge who tried the cause would only allow the verdict to be taken for the £270 and interest, £276 15s.; all the rest being damages for the detention, and the plaintiff having laid those damages at £10 could not recover more.§

We have already seen,|| that in certain cases of contract, where the breach appears to be fraudulent, interest and sometimes even substantial damages, are held to be properly chargeable.

Interest is sometimes given in error by way of damages. In an early case,¶ on affirmance of judgment in the King's Bench on error, a rule was obtained to show cause why the master should not compute interest, and add it to the costs, on the

\* 1 Saund., 201, a, note n. *Osborn vs. Hosier*, 6 Mod., 167. *Sayre vs. Austin*, 3 Wend., 496. *North River Meadow Co. vs. Christ Church*, 2 Zabriskie, 425. *Willmans vs. Bank of Illinois*, 1 Gilman, 667.

† *Southampton Dock Co. vs. Richards*, 1 Mann. & Granger, 448.

‡ Quære, then, if it was here allowed as part of the debt, or as the damages? See, also, *London and Brighton Railway Company vs. Fairclough*, 3 Scott New R., 69 and 88.

§ *Watkins vs. Morgan*, 6 Car. & P., 661.

|| *Supra*, 184, 200.

¶ *Zink vs. Langton*, Douglass, 751, in notes.

ground of an old statute,\* which enacted that, on a writ of error being brought, and judgment affirmed, the person against whom it is sued out shall recover his costs and damages. And it was held that "interest ought to be the measure of damages."

The principle of this statute has been fixed in American legislation. By the judiciary act of the United States,† the Supreme Court is authorized, in case of affirmance of any judgment or decree, to award to the respondent just damages for his delay. And by the rules of the same court,‡ in cases where the suit is defended for mere delay, damages are to be awarded at the rate of ten per centum per annum on the amount of the judgment, to the time of the affirmance thereof. Where there is a real controversy, the damages are to be at the rate of six per cent. per annum only. And in both cases, the interest is to be computed as part of the damages. It is therefore entirely for the decision of the court, whether any damages, or interest as a part thereof, are to be allowed or not, in cases of affirmance.§

The same principle has been followed in New York, where it is provided by statute,|| that "If upon writ of error, the judgment be affirmed, or the writ be discontinued or quashed, or the plaintiff in error be non-suited, the defendant in error shall recover costs, and also *damages for the delay and vexation, to be assessed in the discretion of the court* before whom the writ was returnable." The limit of discretion under this statute is legal interest. The allowance of damages, however, in these cases rests entirely in discretion, and so, where the action was in tort, the Court of Errors refused it.¶ It was allowed, however, in another case, on a judgment in trover.\*\* But this branch

\* 3 Hen. VII., C. 10.

† 1789, ch. 20, § 28.

‡ Made in February term, 1803, and February term, 1807.

§ *Boyce's Executors vs. Grundy*, 9 Peters, 275. *Himsly vs. Rose*, 5 Cranch, 313. *Santa Maria*, 10 Wheat., 431-442.

| 2 R. S., 618, § 88.

¶ *Gelston vs. Hoyt*, 18 J. R., 561.

\*\* *Bissell vs. Hopkins*, 4 Cowen, 58. In the same State it has been said that, "the judicial doctrine of allowing and disallowing interest on judgments, whether on affirmance in error, or in other cases, seems in some respects to rest rather upon arbitrary discretion, practice, or precedent, than any principle which conforms to our general notions of justice." *Klock vs. Robinson*, 22 Wend., 157 and 160.

of the subject rather belongs to the head of statutes regulating damages, which we shall elsewhere consider.

The allowance of interest on judgments generally has been a subject of much discussion. In England, the doubt is solved by a recent statute, which declares that every judgment debt shall carry interest at the rate of four per centum per annum, from the time of entering up the judgment, or from the time of the passage of the act in cases of judgment then entered up and not carrying interest, until the same shall be satisfied, and such interest may be levied under a writ of execution on such judgment.\*

In New York, it has been decided that interest is recoverable in an action of debt on judgment, whether the original demand carried interest or not.† But in debt on judgment for a tort, interest is recoverable only from the date of the judgment, and not from the finding of the verdict.‡ Where the judgment is rendered on contract, it can in New York, by express statute, be collected on execution.§

How far interest is recoverable under the penalty of a bond, we shall have occasion to examine in the next chapter.

It has never been doubted, that where interest is made payable before the principal, suit can be brought for the non-payment of the interest alone;|| but an important question has been presented, how far an action can be maintained for interest after the payment of the principal. In New York, it has been decided that where interest is not stipulated for in the contract, but is recoverable merely as damages, a creditor is precluded from sustaining an action for its recovery after accepting the principal; but that where interest is stipulated for in the contract, suit may be brought for it, although the principal has been paid.¶

So, payment of the amount of principal money due from a debtor to his creditor, will not necessarily prevent an action for

\* 1 & 2 Vict., c. 110, § 17. See *Fisher vs. Dudding*, 8 Scott N. Rep., 516. See, also, *Crafts vs. Wilkinson*, 4 Q. B., 74.

† *Klook vs. Robinson*, 22 Wend., 157, where the English cases are reviewed.

‡ *Lord vs. The Mayor of New York*, 8 Hill, 426.

§ *Sayre vs. Austin*, 8 Wend., 496. 2 R. S., 364. It had been previously decided otherwise; *Watson vs. Fuller*, 6 J. R., 383.

| *Cooley vs. Rose*, 8 Mass., 221.

¶ *Fake vs. Eddy's Ex'rs*, 15 Wend., 76.

the amount of interest. If made generally, it applies first to extinguish the interest, and the balance may be sued for as the principal.\*

It seems well settled that where an attachment or injunction is laid on a party liable to pay interest, it ceases running till the legal impediment is removed.†

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\* *People vs. County of New York*, 5 Cowen, 381.

† *Willing vs. Consequa*, Peters' C. C. R., 301, 321. *Fitzgerald vs. Caldwell*, 2 Dall., 215. 2 *Yates*, 280. *Osborne vs. U. S. Bank*, 9 Wheat., 738. *Stevens vs. Barringer*, 18 Wend., 639. *Le Braithewait vs. Halsey*, 4 Halsted, 3.

See, also, *Kellogg vs. Hitchcock*, 1 Wend., 521. *Bainbridge vs. Wilcocks*, Baldwin's C. C. R., 536. *Legrange vs. Hamilton*, 4 T. R., 613. 2 H. Black., 144.

## CHAPTER XVI.

### OF PENALTIES; LIQUIDATED DAMAGES; AND THE ACTION OF DEBT.

Debt and Covenant—Debt on Bond—Amount of recovery within the Penalty—Assignment of Breaches—Liquidated Damages—No Exeat Bonds—Bonds to resign Livings—Recovery beyond the Penalty.

WE have just terminated the consideration of a large class of cases, in which the damages are in no wise determined by the agreement of the parties. We now come to another class, where the contracting parties fix or liquidate the amount that shall furnish the measure of compensation in case of non-fulfillment of the agreement, either in the shape of a penalty, or of stipulated damages. The questions arising under this branch of our subject are generally presented in one of the two common law actions known as debt and covenant; but we shall endeavor to consider the matter at large, without confining ourselves strictly to either of these technical forms.

At the same time it is impossible altogether to dismiss them from view. The action of *debt* is applicable in all cases where a sum certain is due, whether the contract be by parol, under seal, or of record; while *covenant* is the remedy for breaches of all contracts under seal, whether for sums certain or uncertain. And owing to this arbitrary division of actions, the rules of damages conform in many cases rather to the remedy than the right; we must therefore not lose sight of this technical distinction.

Of all forms of debt, that of debt on ~~is~~ bond now the most frequent. In the early periods of our jurisprudence debt was the common action for goods sold and delivered, and for work and labor done; but it has been to a great extent superseded by



the proceeding in *assumpsit*.\* It is true, as a general rule, that in the action of debt which is brought for the recovery of a sum certain, no damages can be claimed on account of the debt itself, this being recoverable in *numero*; but damages are given on account of the detention of the debt. In an action of debt on bond, therefore, only nominal damages are assessed; nor is it in general necessary to have them assessed to the amount even of what is due for interest, because as under the verdict the plaintiff is entitled to the whole penalty: this, which is double the sum mentioned in the condition, is usually sufficient to cover what is due for interest. But this subject will be more fully noticed in another part of this chapter.

The form of the *obligation*, or *bond* of the English Law, is technical and peculiar. The obligor *binds*, or *obliges* himself to pay a certain sum of money at a certain time, to the obligee. This, if under seal, would be a single bond, or *simplex obligatio*; and would only differ from a note, in being under seal, and not negotiable. But in the bond we find a clause appended, declaring that the previous obligation shall be void on the payment of some lesser sum of money, or the performance of some particular act. The latter part, or *condition* of the bond, is that which discloses the real nature of the contract and contains its essence; the former part is the *penalty*.† *Penal obligations* are well known to other systems of law besides our own;‡ but the precise form of contract, by which an absolute obligation is at first declared, and this converted into a mere penalty by the addition of a subsequent condition, is, I believe, entirely peculiar to the English law.

From this form of obligation or contract, various results, flowing from the technical rules of the common law, were deduced by the founders of our jurisprudence. If the condition was not strictly complied with, as in regard to the payment of money on a day certain, the moment the day was passed the penalty became the debt, and was at law recoverable; and neither payment nor tender after the day would avail, because a condition once broken was gone forever. If the condition were to do any thing other than pay money, and were not fulfilled,

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\* *Supra*, 225. *Rudder vs. Price*, 1 H. Bl., 547.

† *Black. Com.*, II., Ch. 20, 840.

‡ *Pothier, Traité des Obligations*, Part II., Chap. V., des Obligations Pénales.

the penalty again became the debt, and was recoverable without any reference whatever to the actual damages incurred. Hence many difficulties arose. Lord Kaims says,\* that the bond was introduced originally to evade the common law of England, which prohibited the taking interest for money. Whatever reason led to its introduction, certain it is, that its peculiar form has occasioned infinite doubt and contradiction. In regard to our present subject, we shall *first* consider what sum can be recovered under or within the penalty. *Secondly*, how by assigning breaches, that sum is arrived at. *Thirdly*, when the penalty is considered as liquidated damages. And *lastly*, what can be recovered beyond the penalty.

And first, as to the damages that may be recovered *under* or *within* the penalty.

The action of debt, as has been said, is the usual remedy provided by the common law for the recovery of a sum certain. And in an action of debt for condition broken, the amount of the plaintiff's recovery was originally, as has also been said, the penalty; nor could the action be relieved against, either by payment or tender; no defense would avail but a release under seal. And this severe rule of the common law was only mitigated by the practice of the courts of chancery, which interposed, and would not allow a man to take more than in conscience he ought.†

It became early settled in equity that the condition of the bond was the agreement of the parties, and as such the obligor was relieved from the penalty.‡ Lord Somers said,§ “that where the party might be put in as good a plight as where the condition itself was literally performed, there the Court of Chancery would relieve, though the letter of it were not strictly performed, as payment of money, &c. But where the condition was collateral and in recompense, and no value could be

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\* Prin. of Equity, Book iii., ch. ii., 279.

† Black. Com., book ii., ch. 20, 841. For cases of this description in Chancery, see *Hale vs. Thomas*, 1 Vern., 849, and *Steward vs. Rumball*, 2 Vern., 509; also, *Show. Par. Cas.*, 15. Bond and Penalty, *Abr. Eq.*, 91, 92.

‡ *Acton vs. Peirce*, 2 Vern., 480. *Cannel vs. Buokle*, 2 P. Wms., 248. *Watkins vs. Watkins*, 2 Atk., 97. *Bishops vs. Church*, 2 Ves., 871. *Parks vs. Wilson*, 10 Mod., 515. *Hobson vs. Trevor*, 2 P. Wms., 191. *Chilliner vs. Chilliner*, 2 Ves., 528. *Collins vs. Collins*, 2 Burr., 82. See Pothier by Evans, on Penal Obligations, Appendix; and Fonblanque's Treatise on Equity.

§ Prec. in Ch. 487.

put on the breach of it, then no relief could be had for the breach of it."

This practice was followed by the common law tribunals, which ordered the proceedings to be stayed upon bringing into court the principal debt, interest, and costs.\* Finally, this discretionary power was confirmed by a statutory regulation, which provided that in actions on bonds with penalties, the defendant might bring in the principal debt, interest, and costs, and be discharged.†

This legislation has been followed in this country. In New York,‡ it is declared that in actions on penalty bonds, the plaintiff may plead payment of the debt made before suit brought, though not according to the condition; and that after suit brought, the defendant may bring debt, principal and costs, into court, and that thereupon the action shall be discontinued.

Speaking of the English original of this statute, Lord Mansfield said,§

"That it was made to remove the absurdity which Sir Thomas More unsuccessfully attempted to persuade the judges to remedy in the reign of Hen. VII.; for he summoned them to a conference concerning the granting relief at law, after the forfeiture of bonds, upon payment of principal, interest, and costs, and when they said they could not relieve against the penalty, he swore by the body of God he would grant an injunction."

And in another case,|| he said,

"It was extraordinary, that after it was settled in *equity* that the forfeiture might be saved by the performing the intent, and that this was the nature of a bond; the courts of law did not follow equity, but still continued to do *injustice as of course*, and put the parties to the delay and expense of setting it right *elsewhere as of course*."¶

Notwithstanding this statute, however, it is apparent that

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\* *Greggs's Case*, 2 Salk., 596. Anon., 6 Mod., 11. *Butler vs. Rolfe*, ib., 25. Anon., ib., 29. *Burridge vs. Fortescue*, ib., 60; and *Ireland's Case*, ib., 101. In *Burridge vs. Fortescue*, the court said, "It is an equitable motion to be relieved against the penalty."

† 4 Anne, c. 16, §§ 12 and 13.

‡ Rev. Stat., Vol. 2, 353, §§ 26 and 27.

§ *Wyllie vs. Wilkes*, Doug., 519.

|| *Bonafons vs. Rybot*, 3 Burr., 1870, 1874.

¶ In this last case it was held that bonds conditioned for payment of money by installments, were within the Act of 4 Anne.

great injustice might be committed ; because the plaintiff was still entitled to judgment for the whole amount of the penalty, and the defendant could only be discharged by addressing himself to the equitable consideration of the court. Hence was imposed the obligation to *assign breaches*.

By a statute enacted at nearly the same time,\* it was declared " that in all actions, &c., upon any bond or bonds, or on any penal sum for non-performance of any covenants or agreements in any indenture, deed, or writing certain, the plaintiff or plaintiffs *may* assign as many breaches as he or they shall think fit, and the jury upon trial of such action or actions, shall and may assess, not only such damages and costs of suit as have heretofore been usually done in such cases, but also damages for such of the said breaches so to be assigned as the plaintiff, on the trial of the same, shall prove to have been broken."

The language here is, that the plaintiff *may* assign breaches; but it has been settled that the statute is compulsory,† and that a judgment obtained under the former practice of the common law, is bad in error. In the case last cited, Lord Kenyon and Mr. J. Buller said :

" It is apparent to us that the law was made in favor of defendants, and is highly remedial, calculated to give plaintiffs relief up to the extent of the damage sustained, and to protect defendants against the payment of further sums than what is in conscience due; and also to take away the necessity of proceedings in equity to obtain relief against an unconscionable demand of the whole penalty in cases where small damages only have accrued."

And it was accordingly held, that the plaintiff *must* assign breaches, and that the jury *must* assess the damages.

The principles of this act have been engrafted upon the legislation of this country. In New York it is provided :‡

" When an action shall be prosecuted in any court of law, upon any bond, for the breach of any condition other than for the payment of money, or shall be prosecuted for any penal sum for the non-performance of any covenant or written agreement, the plaintiff in his declaration shall assign the specific breaches for which the action is brought.

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\* 8 and 9 Will. III., C. 11, § 8.

† *Roles vs. Rosewell*, 5 T. R., 538, and *Hardy vs. Bern*, ib., 686.

‡ Revision of 1813 (R. Laws, Vol. I., 518), and Revised Statutes, Vol. II., § 800, 2d ed., 378, 1st ed.

"Upon the trial of such action, if the jury find that any assignment of such breaches is true, and that the plaintiff should recover damages therefor, they shall assess such damages, and shall specify the amount thereof in their verdict, in addition to their finding upon any other question of fact submitted to them.

"In every such action, if the plaintiff recover, the verdict of the jury assessing the plaintiff's damages shall be entered on the record, and judgment shall be rendered for the penalty of the bond, or for the penal sum forfeited as in other actions of debt, together with costs of suit; and with a further judgment that the plaintiff have execution to collect the amount of the damages so assessed by the jury, which damages shall be specified in such judgment."\*

These two statutes have together produced this reasonable and equitable result, that in the case of an agreement to do or refrain from doing any particular act secured by a penalty, the amount of the penalty is in no sense the measure of compensation; and the plaintiff must show the particular injury of which he complains, and have his damages assessed by the jury. It may, therefore, be laid down as a settled rule that no other sum can be recovered under a penalty, than that which shall compensate the plaintiff for his actual loss.

In the action of debt on bond, however, judgment still goes

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\* This act has been applied to bonds conditioned for the performance of covenants contained in the same, or in any other deed or writing; for the payment of money by installments; for the payment of an annuity; or for the payment of an award; to bonds given by deputy sheriffs for the faithful performance of the duties of their office, *Barnard vs. Darling*, 11 Wend., 27; for the performance of any other specific act, not being the payment of a sum of money in gross. It has also been applied to replevin bonds, and to bail bonds, and to bonds conditioned to restore the amount recovered in the event of a reversal on certiorari.—*Graham's Practice*, 2d edit., 819 and 801.

Previous to the Revised Statutes, it was held, in New York, that the breaches might be assigned in the replication, or on the circuit or nisi prius roll; but the present statute is more special; and in *Reed vs. Drake*, 7 Wend., 845, it was held that the breaches must be assigned in the declaration; and where the plaintiff, in a suit on an arbitration bond, had omitted to do this, but had assigned the breaches in the replication, and the jury had found a correct verdict, the Court in error refused permission to amend the declaration by inserting an assignment of breaches, and reversed the judgment, expressing their opinion, however, "that the court below would allow the plaintiff to amend his declaration on the usual terms."

Again, in *Livingston vs. The Superior Court of the City of New York*, 10 Wend., 545, the plaintiff, in a suit on a bond given to prosecute a replevin suit in New Jersey, omitted to assign breaches in his declaration, had nominal damages assessed, and entered judgment for the debt, damages, and costs: the defendant paid the nominal damages and costs, and applied to the court below, the Superior Court of the City of New York, for an entry of satisfaction, which that court refused. On an application to the Supreme Court for a mandamus, Nelson, J., said, that the court inclined to the opinion that it was obligatory on the plaintiff to assign breaches, but refused the motion, and left the parties to their remedy in the court below.

for the penalty, owing to the technical rule, that in this action the entire sum is demanded, and the penalty is the debt, according to the express terms of the instrument; this, however, is corrected by the practice which forbids the execution to issue for more than the sum really due.

Damages are given in the action of debt on bond for the detention of the debt, but such damages are in general purely nominal;\* and it is proper to notice that nominal damages may be given by verdict, but not on default.† If, however, the interest exceed the penalty, it will no doubt be necessary to have the actual damages assessed by the jury: if the judgment goes by default, the taxing officer allows the excess in the costs. But the damages are not necessarily nominal, and the jury may give substantial damages if they see fit.‡

We now approach another class of cases, where the parties have agreed on a sum certain as the measure of damages; and this branch of our subject, owing to the existence of the technical penalty, will be found environed by much doubt and contradiction.

When speaking of the subject of damages with regard to the action of debt on bond,§ we have stated the rule, resulting from the peculiar form of that instrument, which fixes a penalty subject to a certain condition. We have now to consider the same matter in another sense.

It is competent for parties entering upon an agreement to avoid all future questions as to the amount of damages which may result from the violation of the contract, and to agree

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\* In Pennsylvania it has been held that, in debt for a penalty by the party aggrieved, damages may be given for the detention; but not in the case of a common informer. *Ritchie vs. Sherman*, 2 Rawle, 196. *Norris vs. Pilmore*, 1 Yeates, 406. In *O'Neal vs. O'Neal*, 5 Watts & Serg., 180, it is said that damages in debt at common law are usually nominal.

† *People vs. Hallett*, 4 Cowen, 67. *Lil. Ent.*, 478, 488, 508. *Tidd's Pr. Forms*, 169-70. 5 *Wentw.*, 165-6, 414; 10 *ib.*, 427-8, 458; 7 *ib.*, 402. *Lil. Ent.*, 257, 379. *Tidd Pr. Forms*, 186, 187. *Clapp vs. Reynolds*, 2 J. Cas., 409. *Lord Lonsdale vs. Church*, 2 T. R., 388. *Wilke vs. Clarkson*, 6 T. R., 308. *Smedes vs. Hooghtaling*, 8 Caines, 48. *Cook vs. Tousey*, 8 *Wend.*, 444, 2 *Saun.*, 107, n. 2.

‡ *Henry vs. Earl*, 8 M. & Wels., 288. In *Belbin vs. Batt*, however, 2 *Mees. & Wels.*, 422, the English Court of Exchequer refused to let in evidence to reduce the damages in an action of debt, on the ground that there was no inquiry in that action as to damages. But might it not have been admissible if offered directly to reduce the damages for the detention?

§ *Supra*, 392, et seq.

upon a definite sum, as that which shall be paid to the party who alleges and establishes the violation of the agreement.\* In this case the damages so fixed, are termed *liquidated, stipulated, or stated* damages. But even where this course has been adopted, and a sum certain named in the contract, difficulty has arisen as to whether it should be considered as such liquidated damages, or only as a penalty† It being settled by the courts, both of equity and law, that a penalty was only intended as a security for the principal sum due, or the actual damages sustained, it became doubtful even when a definite sum was named, whether the parties intended it for that purpose, or whether it was meant as liquidated damages, behind which the courts could not go; and on this subject various cases have been decided.

It is proper, however, before we examine these cases, to notice a distinction as to the way in which the question presents itself, growing out of the form of the contract, from want of a constant attention to which part of the confusion has arisen. The agreement may, in the first place, be to do or refrain from doing some particular act; or in default thereof, to pay a given sum of money, and this was well known to the civil law. "*Non solum res in stipulatum deduci possunt, sed etiam facta; ut si stipulemur aliquid fieri vel non fieri. Et in hujusmodi stipulationibus optimum erit pœnam subicere, ne quantitas stipulationis in incerto sit, ac necesse sit actori probare quid ejus intersit. Itaque si quis ut fiat aliquid stipuletur ita adjici pœna debet: si ita factum non erit, tunc pœnas nomine decem aureos dare spondes.*"‡ This, as Lord Kaimes clearly points out,§ is properly an alternative obligation, and the sum stated is incorrectly termed a penalty.

*Secondly*, the agreement may assume the technical form of the bond, containing a declaration of an absolute indebtedness in a given sum, conditioned to become void on the payment of

\* A provision of this nature has been engrafted on charter parties, and is familiarly known as Demurrage.

† The word *penalty* is in this contradistinction not very correct or significant; the word designates a sum absolutely due in case of the non-performance of an agreement, quite as clearly as the phrase *liquidated damages*. But the term has now acquired a fixed and well settled technical meaning.

‡ Section 7, Inst. de Verb. Oblig.

§ Kaimes's Equity, Book III., Chap. II., §77.

a less sum, or the performance of some particular act. Here there is no express promise or undertaking to do any thing. The promise is contained in and implied from the condition, and that is sanctioned by the *penalty*.

*Thirdly*, the agreement may bind the party absolutely to do, or refrain from doing, the particular act, and then proceed to declare that if the promise is not performed, the party stipulating shall pay a given sum of money as a penalty.

And *lastly*, the agreement may in all respects resemble the last, except that the fixed sum may be declared payable as liquidated or stated damages, or as a forfeiture.

Before proceeding to examine the cases, some few general observations may be of use to serve by way of introduction and illustration. Whenever questions of the nature we are now considering present themselves, the attention of the courts is mainly fixed on three different points: First, the language employed; Second, the subject matter of the contract; and Third, the intention of the parties. These are, indeed, the great elements of interpretation of all contracts. But in the case we are now examining, the courts, especially in this country, have generally shown a marked desire to lean towards that construction which excludes the idea of liquidated damages, and permit the party to recover only the damage which he has actually sustained. The language of the contract is not controlling. If, indeed, the word "*Penalty*" is used, as we shall see hereafter, it will never be construed as a sum absolutely fixed. But the reverse is by no means the case; and the phrase "*liquidated damages*," has often been made to read "*penalty*."

And such, it seems, was the disposition of the civil law in the somewhat analogous case of the *stipulatio duplex*: *Quæ scrupulositates et differentie procedunt propter odiositatem strictamque naturam stipulationis duplex, quæ stricti juris est, contra quam etiam in dubio fit interpretatio. Contra, vero, actio ex empto bonæ fidei est et, etiam favorabilis, cum non competat ad veram pœnam, sed subsistere et probari oportet verum, et justum interesse merito in ea plenior fit interpretatio.\**

The subject matter of the contract and the intention of the

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\* Dumoulin, De eo quod Int., § 128.



parties are the controlling guides. If from the nature of the agreement it is clear that any attempt to get at the actual damage would be difficult, if not vain, then the courts will incline to give the relief which the parties have agreed on. But if, on the other hand, the contract is such that the strict construction of the phraseology would work absurdity or oppression, the use of the term liquidated damages will not prevent the courts from inquiring into the actual injury sustained, and doing justice between the parties.

We may remark, in the first place, that it is well settled, that no damages for the mere non-payment of money can ever be so liquidated between the parties as to evade the provisions of law which fix the rate of interest. So, in a case,\* where a bond was given, that if certain bills were not accepted, the obligors would pay the amount of them, with interest at 10 per cent. by way of penalty, it was insisted that the damages were liquidated. But Lord Loughborough said, "There can only be an agreement for liquidated damages, where there is an agreement for the *performance of certain acts*, the not doing of which would be injurious to one of the parties, or to guard against the *performance of acts* which if done would also be injurious. But in cases like the present, the law having by positive rules fixed the rate of interest, has bounded the measure of damages." And it was held that the amount of the bills, with legal interest only, could be recovered. And in a similar case, this language was held by the Supreme Court of New York: "Such facts constitute no right to recover beyond the money actually due. Liquidated damages are not applicable to such a case. If they were, they might afford a secure protection for usury, and countenance oppression under the form of law."†

The earliest notice of the general subject appears to be in *Sir Baptiste Hints'* case,‡ which is as follows: In an action of

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\* *Orr vs. Churchill*, 1 H. Black., 282.

† *Gray vs. Crosby*, 18 J. R., 219 and 226. In *Galsworthy vs. Strutt*, 1 Exchequer Rep., 659, Park, B., is reported to have said, with, perhaps, less than his usual care and discrimination, "I take it that it would be competent for the parties to make a stipulation to pay a certain sum on the non-performance of a covenant to pay a smaller sum; but they must do so in express terms; and if that be done I do not see how the court can avoid giving effect to such a contract."

‡ 2 Rolles Abr., 708, tit. Trial.

covenant, if the plaintiff counts that in an agreement for certain lands between plaintiff and defendant, the defendant covenanted that if on measurement there were not found as many acres as the defendant had stated to the plaintiff at the time of sale, he would re-pay for each acre wanting £11 per acre, and avers that on measurement, so many acres were wanting as would at £11 per acre amount to £700, and issue being joined whether they were wanting, and the jury find for the plaintiff, and give £400 damages, this issue is well found for the plaintiff; for although it were found that all the acres were wanting, still *they are chancellors*, and may give such damages as the case requires in equity, inasmuch as the whole consists in giving damages.\* To this decision I have already referred, as being strikingly illustrative of the laxity of all the early cases on the subject of compensation.†

In the next case in which the subject was discussed,‡ the plaintiff had executed a bond in £100 penalty to the Duke of Beaufort, that his son should not poach on the Duke's grounds without leave from the game-keeper, or unless in company with a qualified person. The son afterwards fished; the bond was put in suit, the penalty of £100 recovered, and paid by the plaintiff, with £40 costs of suit. This bill was filed for relief. It was insisted that the bond was only given as a security that the son should not poach; but Lord Chancellor Hardwicke said, "It is most absurd to think that bonds of this kind were in-

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\* The original is as follows: "En un action de covenant, si le plaintife count que sur un bargain per certain terres enter le plaintife et defendant, le defendant covenant que si ne fueront tant acres sur le mesure come le defendant ad dit al plaintife sur le vendition que le terre vend fuit, que il repareroit pur chescun acre que deesest del number £11, et allege que sur le mesure tant acres en certain defuerunt que amount, solonque £11 l'acre, al £700; et l'issue est an defuerunt, &c. Et le jurie trove pur plaintife, et done £400 damages. Cest issue est bien trove pur le plaintife; car cœment que soit trove per ceo que tous les acres defuerunt, uncore ils sont chancellors, et poient doner tant damages come le case require en equitie, en tant que tout est d'être done en damages."

† In a subsequent case, *Lowe vs. Peers*, 4 Burr., 2225 and 2229, Lord Mansfield said, "As to the case mentioned by Mr. Mansfield, from Rolles Abr., it is impossible to support it; for it cannot be that a man should be obliged to take less than the liquidated sum. And the writ of error in that case was plainly brought by the defendant. Besides, the damages could never be taken advantage of upon a writ of error. How could the *quantum* of damages found by the jury be the subject of a *writ of error*?"

‡ *Roy vs. The Duke of Beaufort*, 2 Atk., 190, decided in 1741. But on the ground that an ill use had been made of the bond, the Chancellor relieved the plaintiff against the verdict, and decreed the Duke to refund the £100, and £40 damages.

tended merely as a security," and asked, "In what respect is the gentleman who has such a bond in a better condition than he was before, if after obtaining judgment at law, a court of equity will give him no other satisfaction than the bare value of the price of the game that is killed?"

In a case before the same great judge,\* Aylet had charged certain lands by his will with an amount of ten pounds, for the maintenance of a school-master, to be paid half yearly; and if in arrear 42 days after due, 5s. per week were allotted, by way of *nomine pœnæ*. A commission of charitable uses issued from Chancery, summoned the owner of the land, who was in default, and awarded the arrears and the *nomine pœnæ*. Exception was taken that in a court of equity, the *nomine pœnæ* would be relieved against on payment of the actual arrears. Lord Chancellor Hardwicke said that the *nomine pœnæ* should stand, according to the *intention of the parties, as a security for the legal interest*. But he went on to say, that where there is a *nomine pœnæ* in a lease to prevent the tenant from breaking up pasture ground, it is otherwise; for the intention there is, to give the landlord compensation for the damage sustained, and in such case the whole *nomine pœnæ* shall be paid.

And so in a subsequent case† where an increased rent was declared payable provided land should be ploughed up, the agreement was held conclusive on the quantum of damages.‡

Again,§ where a bond had been given by the plaintiff Benson, to the defendant, a hair merchant, as a security for his services in Flanders as an agent to buy hair, the plaintiff was to stay abroad a certain time; and as security for his performance he deposited £100 with the defendant. The plaintiff bought but five pounds' worth of hair, and returned to England before the time agreed on. The bill was filed for £50 per annum agreed to be paid by the defendant to the plaintiff, and also to recover back the deposit. It was insisted that the plaintiff had com-

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\* Aylet *vs.* Dodd, 2 Atk., 238, decided in the same year.

† Farrant *vs.* Olmuis, 8 B. & Ald., 692.

‡ But in Wilbeam *vs.* Ashton, 1 Camp., 78, where assumpsit was brought on an agreement to serve the plaintiff, as a leather dresser, under a penalty of £50, Lord Ellenborough, at nisi prius, said, "The legal construction of such an agreement is this: *beyond* the penalty you shall not go; *within* it, you are to give the party any compensation which he can prove himself entitled to.

§ Benson *vs.* Gibson, 8 Atk., 895. (1746).

mitted a breach, that the £100 was stated damages ; and the previous cases, of the *nomine pænæ* in leases and the poaching bond, were cited ; but Lord Hardwicke said that this was a bond for services only, and refused to decree the penalty, but directed an issue of *quantum damnificatus*.

In a subsequent case,\* the plaintiff demised certain lands in Ireland, for three lives, at the yearly rent of £125, with a condition, that if the tenant should not live on the premises, the rent should be raised to £150. The tenant violated the condition by non-residence. The landlord distrained ; the tenant replevied ; the landlord avowed ; and while the proceedings at law were going on, the tenant filed his bill for a perpetual injunction. The Irish court granted an injunction. An appeal was taken to the House of Lords, where it was insisted that the covenant was only inserted for the sake of improvement, and that it was admitted by the pleadings that the lands had been kept well stocked, and that the agreement had been substantially performed. But the bill was dismissed. No reason being assigned, the case is altogether unsatisfactory ; and if it was intended to decide that the covenant should be considered as one for stipulated damages, it would seem incorrect.

Again,† where the appellant Rolfe, demised certain lands with a covenant on the part of the lessee, that if he, during the term, should convert into tillage any part of the ancient meadow ground that had not been in tillage within 20 years, or if he should plough or sow out of course any of the arable lands, then for such lands converted or sown out of course a further rent of £5 should be paid. There were other covenants against cutting trees, &c. The tenant converted certain furze land, which had not been tilled within 20 years, into tillage, and committed breaches of the other covenants ; upon which the landlord brought an action of covenant, and, default being made, on a writ of inquiry recovered £300. The respondent (the tenant) filed a bill for relief against the judgment ; and Lord Chancellor Camden directed an issue of *quantum damnificatus*, holding that the plaintiff was entitled to relief against the judg-

\* *Ponsonby vs. Adams*, 6 Bro. P. C., 417, case 35, (anno, 1770).

† *Rolfe vs. Peterson*, 6 Bro. P. C., 470, case 42, (anno, 1772).

ment, on making a just and adequate satisfaction for the damages sustained by breach of the covenant. On appeal to the House of Lords, the main question was whether, on an action of covenant by landlord against lessee, and damages assessed by a jury, a court of equity has jurisdiction to direct an issue for re-assessing those damages. It was insisted that the estate had been really benefited by the conversion of the furze land into tillage, and that the £300 verdict was outrageous; but the lords reversed the decree, and dismissed the bill, no reason, however, being assigned. The decision plainly turned on the jurisdiction of Chancery, and so far seems evidently right. The true construction of the contract, whether to be regarded as a penalty or liquidated damages, was not passed upon.

Again,\* where the plaintiff and defendant were partners, and the plaintiff had given the defendant a bond in a penalty of £500 that he, the defendant, should have the use of a particular room, the use of it being refused the defendant brought suit on the bond. This bill was thereupon filed, praying an injunction, and an issue of *quantum damnificatus*; and the only question, on a motion to dissolve the injunction before hearing, was whether the penalty was merely intended as a security for the use of the room, or in the nature of assessed damages. Lord Chancellor Thurlow held that it belonged to the former class, and the injunction was retained.†

In a case already referred to,‡ the defendant had made a contract, under seal, not to marry any person besides the plaintiff; and if he did, to pay her £1,000 within three months thereafter. The defendant married another woman, and this suit was brought. Under the direction of Lord Mansfield, the jury found a verdict for the £1,000. On motion for a new trial, the question was raised, whether the jury could give more or less damages than the £1,000; and it was insisted for the defendant that they might, if they saw fit, give less. But Lord Mansfield remarked, on the difference between covenants in general, and

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\* *Sloman vs. Walter*, 1 W. Brown's Rep., 419, (1784).

† In the case of *Hardy vs. Martin*, cited in notes to this case, the same course was pursued in regard to a bond given by one partner, on the dissolution of a partnership not to trade; and very rightly. In *Astley vs. Weldon*, 2 Bos. & Pul., 343, this latter case was referred to by Chambre, J., who said that he was concerned in it, and that Lord Mansfield, at the trial at law, inclined to think it a case of stipulated damages.

‡ *Lowe vs. Peers*, 4 Burr., 2225, (1768).

covenants secured by a penalty or forfeiture, and said, "In the latter case the obligee has his election. He may either bring an action of debt for the penalty, and recover the penalty, after which recovery, he cannot refer to the covenant, because the penalty is to be a satisfaction for the whole; or if he do not choose to go for the penalty, he may proceed upon the covenant, and recover more or less than the penalty, *toties quoties*; and upon this distinction they proceed in Courts of Equity." That, in the former, to which this case belonged, even equity would not interfere, "the £1,000 is the particular liquidated sum fixed and agreed upon between the parties, and is therefore the proper quantum of damages." But the judgment was arrested on account of the invalidity and illegality of the instrument. The doctrine of this decision has been very recently recognized in the English Court of Exchequer, in an action on a covenant not to lop trees under a given penalty for each tree.\*

The case seems, however, rather that of an agreement to pay a certain sum on a contingency, which contingency is itself dependent on the choice of the party himself, and belongs more properly to the class of alternative obligations of which I have already had occasion to speak.

Where† a bond had been given by the plaintiff to the defendant in £236, conditioned that certain iron work should be done by himself and another party for £118 18s. within six weeks, and if not, they would "*forfeit and pay*"‡ £10 for every week, till it was finished, the plaintiff brought an action for work and labor against the defendant; and the latter pleaded the bond in question, averred that the work had not been performed within the time limited, nor until four weeks there-

\* Hurst *vs.* Hurst, 4 Exch., 571.

† Fletcher *vs.* Dyche, 2 T. R., 82, (1787).

‡ In Tayloe *vs.* Sandiford, 7 Wheat., 18, Marshall, C. J., commented on these words, and said, they were not so strongly indicative of a penalty as the word "*penalty*" itself. But in Horner, *vs.* Flintoff, 9 Mees. & Wels., 678, where an agreement was entered into binding the parties in the sum of £100 "as liquidated and settled damages, to be paid and *forfeited*," the Court of Exchequer, [Parke, B.], said that the case came within that of Kemble *vs.* Farren, hereafter cited, but was rather stronger, "as the word '*forfeited*' was used, which points to a penalty." And in Cheddick's Ex'rs *vs.* Marsh, 1 Zabriskie, 468, the S. C. of New Jersey said, "Where a contracting party stipulates upon a given event to *forfeit and pay* a specified sum, the natural and plain import of the language is, that upon the happening of the contingency he will pay that precise sum, not that it shall stand by way of penalty or surety for damages incurred."

after, and insisted on a set-off of £40. Upon demurrer, it was contended that the £10 was a mere penalty, and could not be set-off. But the Court said that the sums offered to be set-off were liquidated damages, which a court of equity could not relieve against; and Buller, J., said, "It is as strongly a case of liquidated damages as can possibly exist, and is *like the case of demurrage*;" and the demurrer was overruled. It seems, however, to be rather like the case last cited, a conditional agreement, where the party had his election to do the act or pay the money, and not having done the act, he is to be held as having made his election to pay the money.

Again, where\* an agreement was entered into by the defendant to perform for the plaintiff at his theater, and attend all rehearsals, or pay the established fines for all forfeitures of any kind whatsoever, with a clause that either of the parties neglecting to perform the agreement, should pay the other £200, the declaration averred a refusal to perform; plea, non-assumpsit. On trial, a verdict was had for £20, with leave to the plaintiff to enter a verdict for £200 if the court should consider the agreement one in the nature of liquidated damages. Here it will be noticed that the phrase *liquidated damages* was not used, and that if the sum of £200 was not construed as a penalty merely, the non-payment of any one of the fines would have forfeited the whole amount. Lord Eldon, then Lord Chief Justice of the Common Pleas, in delivering the judgment of the court, said that he had felt much embarrassment in ascertaining the principle of the decisions, and that "this appeared to him the clearest principle, that where a doubt is stated whether the sum inserted be intended as a penalty or not, *if a certain damage, less than that sum, is made payable upon the face of the same instrument, in case the act intended to be prohibited be done*, that sum shall be construed to be a penalty, though the mere fact of the sum being apparently enormous and excessive, would not prevent it from being considered as liquidated damages." He went on to say: "*prima facie*, this certainly is contract, and not penalty, but we must look to the whole instrument;" and it was held a penalty.

This case of *Astley vs. Weldon*, was subsequently cited

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\* *Astley vs. Weldon*, 2 Bos. & Pul., 346, (1801).

with approbation;\* and there is no doubt, according to the suggestion of Lord Eldon, that the form of the instrument may make some difference; as if it be a bond, the presumption will be that the greater sum is intended merely as a penalty. This is not, however, the necessary construction of such an instrument.

The doctrine laid down in *Astley vs. Weldon*, was applied, in a subsequent case,† to a very similar state of facts. The defendant had agreed with the plaintiff to act as principal comedian at Covent Garden, and to conform to its rules; the plaintiff was to pay £3 6s. 8d. every night that the theater should be open, and the agreement contained a clause, that if either party failed to fulfill his agreement, or any part thereof, or any stipulation therein contained, such party should pay the other the sum of £1,000, to which sum it was agreed that the damages should amount, and which sum was declared by the parties to be *liquidated and ascertained damages, and not a penalty or penal sum, or in the nature thereof*. The breach alleged, was a refusal to act during the second season, and the jury gave a verdict for £750. A motion was made to increase this verdict to £1,000, on the ground that that sum was the amount liquidated by the parties, but it was denied; and Tindal, C. J., said :

"It is undoubtedly difficult to suppose any words more precise or explicit than those used in the agreement; the same declaring not only affirmatively that the sum of £1,000 should be taken as liquidated damages, but negatively also, that it should not be considered as a penalty or in the nature thereof. And if the clause had been limited to breaches which were of an uncertain nature and amount, we should have thought it would have had the effect of ascertaining the damages upon any such breach at £1,000. For we see nothing illegal or unreasonable in the parties by their mutual agreement, settling the amount of damages uncertain in their nature, at any sum upon which they may agree. In many cases such an agreement fixes that which is almost impossible to be accurately ascertained, and in all cases it saves the expense and difficulty of bringing witnesses to that point. But in the present case, the clause is not so confined; it extends to the breach of any stipulation by either party. If, therefore, on the one hand, the plaintiff had neglected to make a single payment of £3 6s. 8d. per day, or on the other hand, the defendant had refused to conform to any usual regulation of the theater, how-

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\* *Street vs. Rigby*, 6 Ves., 815.

† *Kemble vs. Farren*, 6 Bing., 141.



ever minute or unimportant, it must have been contended that the clause in question, in either case, would have given the stipulated damages of £1,000. But that a very large sum should become immediately payable in consequence of the non-payment of a very small sum, and that the former should not be considered as a penalty, appears to be a contradiction in terms; the case being precisely that in which courts of equity have always relieved, and against which courts of law have, in modern times, endeavored to relieve by directing juries to assess the real damages sustained by the breach of the agreement. It has been argued at the bar, that the liquidated damages applied to those breaches of the agreement only which are in their nature uncertain, leaving those which are certain to a distinct remedy, by the verdict of a jury; but we can only say, if such is the intention of the parties, they have not expressed it, but have made the clause relate, by express and positive terms, to all breaches of every kind. We cannot, therefore, distinguish this case in principle from that of *Atley vs. Weldon*, in which it was stipulated that either of the parties neglecting to perform the agreement should pay to the other of them the full sum of £200, to be recovered in his Majesty's Courts at Westminster."

The authority of this case has been repeatedly recognized. So, in a case in the Court of Exchequer, where the sum named was held a penalty only, Parke, B., said :

"The rule laid down in *Kemble vs. Farren*, was, that when an agreement contained several stipulations of various degrees of importance and value, the sum agreed to be paid by way of damages for the breach of any of them shall be construed as a penalty, and not as liquidated damages, even though the parties have in express terms stated the contrary. \* \* When parties say that the same ascertained sum shall be paid for the breach of any article of the agreement, however minute and unimportant, they must be considered as not meaning exactly what they say, and a contrary intention may be collected from the other parts of the agreement."\*

But the principle contained in *Kemble vs. Farren* has been since explained and modified. So in a recent case, where the defendant on retiring from business had covenanted that he would not reside within the distance of two miles and a half from his then residence, and that if he did, he would pay £1,000, as liquidated damages, and not as penalty; and he unfortunately fixed his new residence a few feet within the distance, it was held that the whole sum was recoverable. Parke, B., saying that *Kemble vs. Farren* was "somewhat stretched," and that

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\* *Horner vs. Flintoff*, 9 Mees. & Wels., 678. See, also, *Boys vs. Ancell*, 5 Bing. N. C., 390; *Beckham vs. Drake*, 8 Mees. & Wels., 846, and *Edwards vs. Williams*, 5 Taunt., 247.

"if a party agrees to pay £1,000 on several events, all of which are capable of accurate valuation, the sum must be construed as a penalty, and not as liquidated damages. But if there be a contract consisting of one or more stipulations the breach of which cannot be measured, then the parties must be taken to have meant that the sum agreed on was to be liquidated damages, and not a penalty."\*

So, again, where the defendant had contracted not to practice as a performer within a certain district, he bound himself to the plaintiff in the sum of £5,000, "as and by way of liquidated damages, and not of penalty;" the authority of *Kemble vs. Farren* was invoked for the defendant; but the court said:

"Where the deed contains several stipulations of various degrees of importance as to some of which the damages might be considered liquidated, whilst for others they may be deemed unliquidated, and a sum of money is made payable on a breach of any of them, the courts have held it to be a penalty only, and not liquidated damages. But when the damage is altogether uncertain, and yet a definite sum of money is expressly made payable in respect of it by way of liquidated damages, those words must be read in the ordinary sense, and cannot be construed to import a penalty."†

Where suit was brought on an agreement made between two coach proprietors, that in consideration of a certain sum of money, the defendant would withdraw his stage-coach, and not concern himself in driving any other coach on that road, and the agreement contained a clause that for its due and punctual performance, each of the parties bound himself to the other "in the sum of £500, to be considered and taken as liquidated damages, or sum of money forfeited or due from the one party to the other, who shall neglect or refuse to perform his part of the agreement;" it was held not a penalty, but liquidated damages, from which the court would not depart.‡

And the same point was decided in a very analogous case,

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\* *Atkyns vs. Kinnier*, 4 Exch., 776. See, also, *Galsworthy vs. Strutt*, 1 Exchequer, 658.

† *Green Ex'r vs. Price*, 18 Mees. & Wels., 695, and *Price vs. Green*, 16 M. & W., 346. For another recent case in England, on the subject of liquidated damages, under an agreement not to practice as surgeon, &c., see *Rawlinson vs. Clarke*, 74 M. & Wels., 187, where the doctrine of *Green vs. Price* was affirmed.

‡ *Barton vs. Glover*, at *Nisi Prius*, 1 Holt's N. P. Cases, 48.

at an early day,\* by the Supreme Court of Massachusetts, where the opinion was delivered by Mr. Justice Sedgwick.

A good deal of stress has been in different cases laid on the words of the contract. At nisi prius, Abbott, C. J., is reported to have said,† “that whatever the expressions, and in whatever mode the agreement be made, whether the stipulation is for liquidated damages or for a penalty, the plaintiff shall recover such damages as, upon a view of the whole case, the jury shall think fit to give,” excepting, at the same time, contracts under seal. It is difficult, however, to believe that any such language was used by a judge so able as Lord Tenterden. At all events, this case has been distinctly overruled,‡ and is opposed to the whole current of authorities.

Though the intention of the parties is the great guide of inquiry, still, in one aspect, the language may be conclusive; and it seems to be settled, that if the word *penalty* or *penal* be used (subject to a single exception hereafter stated§), no construction shall convert the agreement into one for liquidated damages; though the reverse is far from being the case.¶

Where¶ a sum fixed on by the parties was held conclusive, Park, J., in giving judgment, referred to the case of *Astley vs. Weldon*, and laid stress on the fact, that the term *liquidated damages* had not been there used.

But what if both expressions be used? In a case,\*\* where an agreement had been entered into, not to carry on the business of a surgeon, in consideration of the purchase of the goodwill, with a clause that both parties were bound to each other *in the penal sum of £500, as and by way of liquidated damages*; the plaintiff agreeing on his part, to pay a bill of £170; it was held a penalty. It is plain that this case came within

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\* *Pierce vs. Fuller*, 8 Mass. R., 223.

† *Randall vs. Everest*, 2 Car. & Payne, 577; S. C., 1 Mood. & Malk. In *Longridge vs. Dorville*, 5 B. & Ald., 117, it was held, that the giving up of a suit instituted for the purpose of trying a doubtful question, and consenting to deliver up a ship which might otherwise have been detained until the security required was given, was a good consideration to support a promise to pay damages not to exceed a certain sum, the actual damages to be afterwards ascertained.

‡ *Crisdee vs. Bolton*, 3 Car. & Payne, 240.

§ *No exact* bonds, and other bonds of a like character.

¶ See *Smith vs. Dickenson*, 3 B. & Pull., 680 and 682.

¶ *Reilly vs. Jones*, 1 Bing., 302.

\*\* *Davies vs. Penton*, 6 B. & Cres., 216.

the principle of *Astley vs. Weldon*, as £500 might become the damages for not paying £170.

But in a subsequent case,\* a somewhat similar agreement was entered into, *under a penal sum of £500, to be recovered as and for liquidated damages*, and it was held the latter. Best, C. J., at nisi prius, said :

"The law relative to liquidated damages has always been in a state of great uncertainty. This has been occasioned by judges endeavoring to make better contracts for parties than they have made for themselves. I think that the parties to contracts, from knowing exactly their own situations and objects, can better appreciate the consequences of their failing to obtain those objects, than either judges or juries. Whether a contract be under seal or not, if it clearly states what shall be paid by the party who breaks it to the party to whose prejudice it is broken, the verdict in an action for the breach of it, should be for the stipulated sum. A court of justice has no more authority to put a different construction on the part of an instrument ascertaining the amount of damages than it has to decide contrary to any other of its clauses. Our office is to ascertain the intent of the parties, and if not contrary to law, to carry their intent into execution. In the present case, no evidence has been adduced of the amount of damage sustained by the plaintiff. In this, and in most other cases of this sort, it would be impossible to give such evidence as would enable juries to do complete justice. The claim for damages must depend not only on things which have been done, but on what may be done, which it is impossible to prove; on the value of the customers which the conduct of the vendor of the lease has attached to him, and what numbers his future conduct in the house that he has taken is likely to draw to him. We can have no safer guide to go by in deciding on the amount of compensation for breach of contract in such cases than that estimate which the parties, each knowing all the circumstances of the case, and anxiously taking care of their respective interests, have agreed on.

"I cannot subscribe to the doctrine attributed to Lord Tenterden, in *Randall vs. Everest*. If it be doubtful, from the terms of the contract, whether the parties mean that the sum mentioned in it shall be a penalty or liquidated damages, then I should incline to consider the clause as creating a penalty, and not giving stipulated damages.

"In this case the sum of £500 is to be paid for the doing of one thing only, viz., setting up a victualing-house within one mile of the house transferred to the plaintiff. It is called a penal sum; and I will admit that the parties considered it as something more than compensation, but they have expressly agreed that this penal sum shall be recovered as and for stipulated damages. When the defendant has so unequivocally agreed, that if he ever did what it has been proved that he did he would pay £500, what right has he now to say that the verdict against him ought not to be of this amount?"

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\* *Crisdee vs. Bolton*, 3 Car. & Payne, 240.

The decisions in this country are now to be examined. Our courts will be found generally to be inclined to treat a fixed sum as a penalty, and to hold that the real damages are to be inquired into. Thus,\* where the plaintiff had agreed to convey to the defendant seven hundred acres of land in exchange for a farm, valued at \$3,750, with a further covenant that in case of failing, the party not fulfilling the covenant "should pay to the other party the sum of \$2,000 damages," the Supreme Court of New York held this to be a penalty; and stress was laid on the great discrepancy between the value of the property to be exchanged and the damages for not fulfilling the contract.

Where an action† was brought on an agreement, by which the defendant, in consideration of \$500 received in full for 50 acres of land, agreed to convey the land in one year, or in lieu thereof to pay \$800; in this case, the words of the contract were held to be too express to be questioned, and the land not having been conveyed, the sum was treated as liquidated damages. This case, however, properly belongs to the class of alternative contracts, which I have already noticed, and the distinction has been well pointed out by a learned and very able judge.‡ Where, in consideration of the conveyance of certain city lots for \$21,000, *only*, the defendant covenanted that he would erect on or before the 1st of May, 1836, within two years, two brick houses thereon, or in default thereof, pay four thousand dollars, after the first of May, 1836, and Bronson, J., said :

"This does not belong to the class of cases in which the question of liquidated damages has usually arisen. It will be found in most if not all of those cases, that there was an absolute agreement to do or not to do a particular act, followed by a stipulation in relation to the amount of damages in case of a breach. But here there is no absolute engagement to build the houses. It was optional with the defendant whether he would build them or not."

And mainly on the ground that the defendant had made his election not to build, but to pay, and that the court would not modify or reform the agreement between the parties, the sum of \$4,000 was held to be the measure of damages.§

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\* *Dennis vs. Cummins*, 8 J. Cases, 297.

† *Slosson vs. Beadle*, 7 J. R., 72.

‡ *Bronson, J., in Pearson vs. Williams' Adm'r*, 24 Wend., 244; S. C. in Error, 26 Wend., 680.

§ When this case came into the Court of Errors, Mr. Senator Ely moved to reverse

Where an agreement had been made\* by which the defendant covenanted, on the 1st of January then next, to convey certain lands, and the plaintiff agreed to pay the price, \$1,250, on the delivery of the deed, and in case of failure, they bound themselves each to the other in the sum of \$500, which they consented to fix and liquidate as the amount of damages to be paid by the failing party; in this case, it was held to be too clear for question; and that the sum of \$500 was to be regarded as liquidated damages. The plaintiff having by parol enlarged the time for the delivery of the deeds (although to no fixed day), it was insisted that such extension was a waiver of the liquidated damages, and that the plaintiff could only recover his actual loss; but the court held otherwise, and that the stated sum was still to be the measure of compensation.

In all cases where a party relies on the payment of liquidated damages as a discharge, it must clearly appear from the contract that they were to be paid and received absolutely in lieu of performance; and it is also settled here as we have seen in England;† that a covenant on a certain contingency to pay to another person a sum of money, with a provision that if he fails, then to pay a larger sum as liquidated damages, would be wholly incompatible with our laws in restraint of usury.

Both these points were ruled in a case‡ already referred to, where the plaintiff had made a bond and mortgage to a third party, in the sum of \$5,000, which had been assigned to the defendant, and a covenant was then entered into between them, that three several farms belonging to the plaintiff and covered by the mortgage, should be appraised by arbitration; that if their value fell short of the defendant's claim, he should have them (*i. e.* the three farms); if they exceeded his demands, he should pay the balance, with a stipulation that either party failing should forfeit to the other \$500 as liquidated damages. The farms were assessed, a balance found in favor of the plaintiff, and the

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the judgment, on the ground that the doctrine of liquidated damages ought never to apply to a case which admitted of partial performance, as here where the houses might have been half built, but only where the contract must be wholly performed, or left wholly unperformed. It is plain that this consideration did not apply to this case. But there may be instances where the suggestion will be found not without weight.

\* *Hasbrouck vs. Tappen*, 15 J. R., 200.

† In *Orr vs. Churchill*, 1 H. Black., 282, *supra*, 481.

‡ *Gray vs. Crosby*, 18 J. R., 219. *Supra*, 400.

defendant refused to pay. The sum of \$500 was claimed ; and the defendant admitted that he was bound to pay that sum as liquidated damages, but insisted that on such payment, the whole agreement was to be rescinded ; and as his \$5,000 bond remained due, he offered to off-set the \$500 against the \$5,000 due on the bond, and asked that the balance should be certified in his favor. But the jury, under the charge of the court, found a verdict for the plaintiff for the balance fixed by the appraisers, and on a motion for a new trial, this was held right. It was held, so far as the defendant was concerned, that the stipulated damages were not intended in lieu of a "performance of any thing to be done, nor as an extinguishment of the appraisal itself ; and that as to the plaintiff, he could only recover the exact balance due him."

In the same State,\* a contract to pay three hundred and sixty dollars for twelve cows and twelve calves, in four years, was held to be in the nature of a penalty merely, and that the plaintiff could only recover the value of the cows and calves. And this on the same grounds as in the two last cases.†

In a subsequent case,‡ the following facts were presented : By articles of dissolution between the plaintiff's intestate and the defendant, the defendant agreed to pay \$3,000 in various installments, of which the last was one of \$750, on the 1st of December, 1812. The articles then recited, that the object was for the intestate entirely to quit the business, and for the defendant to continue it, and that such intention was the basis of allowing the \$3,000, and then declared, that in case the intestate should be concerned in or carry on the same kind of business within twenty miles from the present stand, the last installment should not be paid. The action was for the last installment, in answer to which the defendant proved that the plaintiff's intestate had recommenced the partnership business within four miles. It was insisted that the contract was in the nature of a penalty ; but the court said, "a more suitable case for the liquidation of damages by the parties themselves, can hardly be

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\* *Spencer vs. Tilden*, 5 Cowen, 144.

† In *Nobles vs. Bates*, 7 Cowen, 307, this decision was said to go on the oppressiveness of the contract.

‡ *Nobles vs. Bates*, 7 Cowen, 307. See a similar English case, *supra*, 408.

imagined;" and the nonsuit which was directed at the trial was sustained.

The rule laid down in *Astley vs. Weldon*, and already stated, that when the agreement contains formal distinct covenants on which there may be divers breaches, some of an uncertain nature, and others certain with one entire sum specified to be paid on breach of performance, then the contract will be treated as one for a penalty and not liquidated damages, was approved in New York,\* where a bond was given in the penal sum of \$10,000, conditioned that the defendant would not practice as a physician, and if he did, that he should pay \$500 for every month that he so practiced. Here the \$10,000 was held to be penalty, and the \$500 stipulated damages. And the same rule has been laid down in New Jersey.†

In a case‡ where the plaintiff had entered into an agreement with the defendants to sell them two lots of ground on certain terms, upon compliance with which the plaintiff was to give a deed, and to this a clause was added, "that if the parties of the second part should fail to perform this contract, or any part therein specified, they will pay the said party of the first part twenty-five dollars, *as liquidated damages*, and give immediate possession to the said party of the first part," the plaintiff brought an action of covenant for breach of the condition. The defendant pleaded tender of \$25. But the Supreme Court of New York said, "There is nothing in this case which authorizes us to say that it was in the contemplation of the parties that the defendants might relieve themselves from their covenants to pay the price of the land by paying the sum agreed upon as stipulated damages, and surrendering possession;" and the plea was, for this as well as for other reasons held bad.

Again,§ where the defendant covenanted to assign to the plaintiff a lease, and to deliver possession thereof, with the following provision: "And I further covenant that, in case of non-performance of any or either of the above covenants, I will forfeit the sum of five hundred dollars, as the liquidated

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\* *Smith vs. Smith*, 4 Wend., 468. See, also, *Spear vs. Smith*, to same point, 1 Denio, 464.

† *Cheddick's Ex'r vs. Marsh*, 1 Zabriskie R., 468.

‡ *Ayres vs. Pease*, 13 Wend., 898.

§ *Knapp vs. Maltby*, 18 Wendell, 587.



damages to the said Knapp," the same court said, "It is a clear case of liquidated damages, if it is in the power of parties to liquidate them."

The subject was much considered in a subsequent case;\* the defendant, Williams, for \$3,000, sold to the plaintiff a newspaper establishment, called the *Utica Sentinel*, and all his interest in the subscription, good will, and patronage of the paper, together with the types, &c., for \$500. In consideration of this the plaintiffs on their part, covenanted to pay to Williams \$3,500, viz., \$3,000 for the patronage and good will, &c., and \$500 for the types, &c. And then followed a covenant, by which the defendants agreed that they would not establish any paper in the city of Utica, nor suffer any paper to be established in any building owned by them, nor aid nor assist in such publication; and to this was added a clause, binding the defendants to the strict and faithful performance of this covenant, and every part thereof, in the sum of \$3,000, and declaring that the said sum of \$3,000 should be, and was thereby fixed and settled as liquidated damages, and not as a penal sum for any violation of the preceding covenant, or any of its terms or conditions. The breach alleged was the publication of another paper. The cases which we have been considering were reviewed, and the \$3,000 was held to be liquidated damages, both by the Supreme Court and Court of Errors. The Supreme Court held, that

"It was only the province of the court to inquire into the intent of the parties, and that whether the bargain was wise or foolish was not for them to decide;" and went on to say, "in the case of *Astley vs. Weldon*, Lord Eldon repudiates the idea that had been thrown out in some of the previous cases, that if the sum would be enormous and excessive considered as liquidated damages it should then be taken as a penalty, and maintains the ability of the party to make a contract for himself in fixing the amount of damages, as well as in respect to any other matter. All the judges adopt the position that the question must be determined upon the meaning and intent of the parties. A principle is stated in that case which has since been frequently applied, and upon which the case was finally disposed of, namely, that where a doubt appears whether the sum inserted be intended as a penalty or not, if a certain damage, less than this sum, be made payable upon the face of the instrument in case the breach occurs, the same shall be construed to be a penalty. It then partakes of the character of a common money bond, where the payment of a small sum is secured by the forfeiture of a large one in case of default. In

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\* *Dakin vs. Williams*, 17 Wendell, 447, and *S. C. in Error*, 22 Wend., 201.

that case there were several stipulations in the articles of agreement; and then, on either neglecting to perform on his part, the sum of £200 to be recovered in any of his Majesty's courts of record, was to be paid. Some of the breaches were in their nature uncertain, while others were certain, and as the £200 were given to secure the fulfillment of all of them upon the principle above stated, the court concluded it was to be deemed in the light of a penalty."

Chambre, J., observed, "that there was one case in which the sum agreed for must always be considered as a penalty, and that is, where the payment of a smaller sum is secured by a larger;" and he held that the court could not garble the covenants, and hold that in respect to those *certain*, the larger sum was to be deemed a penalty, but damages liquidated as to those *uncertain*, as the concluding clause applied equally to all of them. The decision of the case of *Kemble vs. Farren*, the strongest one in the books for the defendants, was put upon this principle by Chief Justice Tindal. There, some of the strongest stipulations were *certain*, such as the one in which the plaintiff had agreed to pay the defendant £3 6s. 8d. every night in which the theater would be open during the season, others were *uncertain*. The language of the parties in fixing the sum in case of neglect to fulfill the agreement or any of the stipulations, was as particular and specific as in the case under consideration, using affirmative and negative terms to exclude the idea of a penalty; but as it extended to the breach of every stipulation, those certain as well as those uncertain, the case was supposed to be brought directly within the principle of *Astley vs. Weldon*. The Chief Justice concedes that it was difficult to suppose words more precise or explicit, and admitted that if the clause had been limited to breaches which were of an uncertain nature and amount, the court would have considered it as having the effect of ascertaining the damages of any such breach at the £1,000;" and he adds, "for we see nothing illegal or unreasonable in the parties, by their mutual agreement, settling the amount of damages uncertain in their nature at any sum upon which they may agree." The case under consideration falls directly within the above distinction; for the concluding clause here, securing the fulfillment of the preceding covenant, applies to stipulations wholly uncertain; and, it may be added, that, from the nature of the case, it would be impossible for a court and jury to ascertain with any degree of accuracy the amount of damages actually arising out of the breach of them to the prejudiced party; and it was, therefore, a very fit and proper case for the liquidation of the amount by the parties themselves. They have adopted the precise sum which the plaintiffs were to receive for the *good will* and *patronage* of the press—the very benefit which this clause was intended more effectually to secure to the purchasers."\*

And in the Court of Errors, the Chancellor in pronouncing his opinion,† laid stress on the fact, that, without the stipulation, the damages were wholly uncertain, and incapable of esti-

\* See the doctrine of this case again adopted by Mr. Ch. Walworth, in *Sheil vs. M'Nitt*, 9 Paige, 101.

† 22 Wendell, 210.

mation, otherwise than by conjecture. In a recent case in the same State,\* the preference of the law to construe the stated sum as a penalty, was very strongly declared :

“I do not think that penalties like this (for they are seldom any thing other than penalties) should be favored. I yielded my opinion, in *Dakin vs. Williams*, for the reason which there governed the Chief Justice, viz. : because, on the whole contract, we could not *doubt* the parties intended that the damages should be paid for violating the stipulation in question; and because it was difficult, not to say impossible, from its nature, that the damages for a breach could be ascertained by a jury. The latter may be said here of failing to give the five days' notice; but we want the clear intent of the parties, that such an omission was to be punished by such a disproportionate fine. It is evidently upon that clear intent that *Dakin vs. Williams* went, and that could the chief justice have brought himself to doubt, he would never have consented to apply the penalty. It is commonly hard enough in such cases that we should be bound by the letter; though such is the result of the cases where liquidation is impossible. The creditor is a very apt apprentice in the art of enlarging any opening which the law leaves him for encroachment; while the debtor, especially if he be poor or embarrassed, is most complying; and could he have his way, would prove his own worst enemy. Hence our usury laws, and the system of equitable relief against penalties. To allow the use of penalties as damages, at the unlimited discretion of the parties, would lead to the most terrible oppression in pecuniary dealings. The fair and just rights of the creditor are worthy of all protection, but no more than the debtor's right to exemption from what is beyond an honest compensation to his creditor.”

The subject has been considered by the Supreme Court of the United States.† A written contract was entered into, by which the defendants in error, T. & S. Sandiford, agreed to build for the plaintiff three houses on the Pennsylvania Avenue, in Washington. A subsequent contract, under seal, was entered into between the same parties, for the building of three additional houses, “the same to be completely finished on or before the 24th day of December next, *under a penalty of one thousand dollars* in case of failure.” The three houses were not finished at the day. The plaintiff in error retained the sum of \$1,000, as stipulated damages, out of the money due the defendants in error. This suit was brought, and on the trial the plaintiff in error (the defendant below), offered to set-off the \$1,000 as stipulated damages, which was not allowed; and the

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\* *Hoag vs. McGinnis*, 22 Wend., 163, per Cowen, J.

† *Tayloe vs. Sandiford*, 7 Wheaton, 13.

Supreme Court held the charge on this point right, though a new trial was ordered on other grounds. Marshall, C. J., said,

"In general, a sum of money in gross to be paid for the non-performance of an agreement, is considered as a penalty. It will not of course be considered as liquidated damages. Much stronger is the inference in favor of its being a penalty, when it is expressly reserved as one. The parties themselves denominate it a penalty, and it would require very strong evidence to authorize the court to say that their own words do not express their own intention."<sup>\*</sup>

The courts of the various States seem to have substantially adhered to the rules laid down in the courts of England and New York.†

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<sup>\*</sup> And the court referred to *Smith vs. Dickenson*, 8 Bos. & Pull., 680, and *Fletcher vs. Dyche*, 2 T. R., 32.

† *Lawrence vs. Parker*, 1 Mass., 191; *White vs. Dingley*, 4 Mass., 433; *Upham vs. Smith*, 7 Mass., 265; *Pierce vs. Fuller*, 8 Mass., 223; *Perkins vs. Lyman*, 11 Mass., 76; *Merrill vs. Merrill*, 15 Mass., 438; *Stearns vs. Barrett*, 1 Pick., 243; *Kellogg vs. Curtis*, 9 Pick., 534; *Curtis vs. Brewer*, 17 Pick., 518. For other American cases, see *Dyer vs. Dorsey*, 1 Gill & J., 440; *Martin vs. Taylor*, 1 Wash. C. C. R., 1. See, also, *Clark vs. Jones*, 1 Denio, 516.

In *Heard vs. Bowers* (38 Pick., 455), the Supreme Court of Massachusetts reviewed the cases of *Astley vs. Weldon*, and *Kemble vs. Farren*, and adhered to the rule as there settled.

The case of *Hodges vs. King*, 7 Metcalf, 583, was that of a bond with a penalty, conditioned to procure the assignment of a certain bond and mortgage, or to pay a given sum of money. The Supreme Court of Massachusetts said that the true construction of the agreement was to be deduced from all the circumstances—that the adoption of the form of a bond was not conclusive, and they held the sum named to be *liquidated damages*. Here it will be observed, however, that the undertaking was in the alternative.

In the case of *Shute vs. Taylor*, 5 Met., 61, the Supreme Court of Massachusetts, after stating it to be "the tendency and preference of the law to regard a sum stated to be payable if a contract is not fulfilled as a penalty, and not as liquidated damages," held it decisive against the latter construction, that in the case before them, there has been a part performance, and an acceptance of such part performance. Vide *supra*, 418, in notes.

In Alabama, also, similar decisions have been made. Thus, it has been held there to be correct as a general rule, that the obligation to pay a sum of money which may be discharged by the payment of a lesser sum, is to be considered as a penal obligation, and that the lesser sum only is recoverable with interest. But where the payment is to be made at a different and distant place, it is otherwise. *Plummer vs. M'Kean*, 2 S., 423.

A note for a sum certain at a future day, which may be discharged by the payment of a lesser sum at any earlier day, is valid, and the larger sum is not penalty. *Gordon vs. Lewis*, 2 S., 426.

Where articles covenant for the performance of several things, and stipulate for the payment of a sum in gross in the event of a breach, the sum expressed will be regarded as a penalty; and if the parties would stipulate the damages in such a case, they should express the sum to be paid on each distinct breach. *Watts' Ex'rs vs. Shepard*, 2 A. R., 425. See a case in Vermont, *Sawyer vs. McIntyre*, 18 Verm., 37.

We have seen that the form of the instrument is usually conclusive where the term *penalty* is employed, but this is not absolutely universal; and even bonds are sometimes held obligatory for the penalty as liquidated damages. Thus, the Supreme Court of New York\* held a *ne exeat* bond conditioned in the usual form, that the defendant in the chancery suit should not leave the State, binding for the full amount of the penalty, without any examination into the real loss sustained by the plaintiff. But this was on the ground that the bond was given under the direction of the Court of Chancery.

It has been held otherwise in England, in regard to bonds to resign livings. Debt was brought† on a bond, the condition of which was that the defendant should resign a rectory (to which he had been presented by the plaintiff) when either of two persons named should be capable of taking it. The breach alleged was a refusal to resign. The net annual value of the living was £700; the life interest of the defendant was worth ten years' purchase; and the life interest of one of the persons named in the bond was worth fourteen years' purchase. The jury found a verdict for the latter, and larger amount. The Solicitor General, on behalf of the defendant, moved for a new trial, on the ground that the value of the defendant's life interest was the true rule of damages; and that the gross receipts did not furnish the true rule, but that the yearly stipend to the curate should have been deducted. But the court said, "We are not prepared to say, that the jury in this case have formed a wrong estimate of the damages; for the defendant, having entered into a bond to do a particular thing, which he has refused to do, *is a wrongdoer*, and he is not permitted to estimate the value of the living, as if he were the purchaser of it." We have already had occasion to consider‡ the propriety of the suggestion here made, that in an action *ex contractu*, the motives of the defendant can be taken into consideration.§

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\* *Harris vs. Hardy*, 8 Hill, 398.

† *Lord Sondes vs. Fletcher*, 5 Barn. & Ald., 335.

‡ *Supra*, 207, et seq.

§ In coming to this conclusion, however, the court seems to have been somewhat influenced by an offer made by the plaintiff to relinquish all claim to damages, if the defendant would resign the living, for they also said: "Besides, it appeared at the trial that the defendant had it in his power to relieve himself from this verdict, by resigning the living; and if he does not do that, it is clear that he considers the dam-

On a review of the cases, the following principles seem deducible from them, as those which are to govern, whenever a question of the kind considered in this chapter is presented :

*First.* That the language of the agreement is not conclusive, and that the effort of the tribunal will be to get at the true intent of the parties, and to do justice between them. In England there seems to be a readier disposition to uphold the liquidation of the damages than in this country ; and I cannot but express my opinion that the courts of the United States have shown an unwise reluctance to admit the agreement as conclusive on this point. If the purpose is clear, there seems no reason to hesitate in giving it full effect.

*Second.* That when the agreement is in the alternative to do some particular thing or pay a given sum of money, the court will hold the party failing to have had his election, and compel him to pay the money.

*Third.* That in case of an agreement to do some act, and upon failure to pay a sum of money, the court will look into the intent of the parties ; that no particular phraseology will be held to govern absolutely ; but that although the term " liquidated damages " will not be conclusive, the phrase " penalty " is generally so, unless controlled by some other very strong consideration.

*Fourth.* That if the sum be evidently fixed to evade the usury laws or any other statutory provision, or to cloak oppression, the courts will relieve by treating it as a penalty. Consequently, whenever the sum stipulated is to be paid on the non-payment of a less sum made payable by the same instrument, it will always be held a penalty.

*Fifth.* That where independently of the stipulation the

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ages found by the jury as less than the value of the living to him." When this case came on Error to the House of Lords, the bond was held to be void. *Fletcher vs. Sondes*, 3 Bing., 601. In the previous case of *Bishop of London vs. Ffytche*, 1 East, 487, the validity of a bond given to *resign a living* came in question, and was sustained by all the judges, Lord Mansfield presiding. See remarks on the subject in Lord Campbell's *Life of Lord Thurlow* in " *Lives of the Chancellors*," Vol. 5, 523 ; and see, also, *Dwarris on Statutes*, ed. of 1848, Errata and Addenda, lvi.

But, again, in a subsequent case, *Legh vs. Lewis*, 1 East, 398, an action brought on a bond given to *resign the mastership of a school*, the bond was held good at law, and it was said that the decision of the House of Lords, in *Fletcher vs. Sondes*, turned upon the ground of the bond in that case being simoniacal and against the statute, and not as contrary to the general principles of the common law.

damages would be wholly uncertain, and incapable of being ascertained except by conjecture, there the damages will be usually considered liquidated, if they are so denominated in the instrument.\*

The consequences resulting from the construction of agreements in this point of view, are complex and curious. On one hand, it may be in many cases desirable to get rid of the stipulated damages, and to require an examination into the real loss sustained. But, on the other, a specific performance may be desirable; and this cannot be had if the damages are to be considered as liquidated, the parties having in that case provided their own redress. Equity will only interfere where the sum is clearly meant as a penalty. So† where articles were executed for the purchase of an estate, with a provision that if either should break the agreement, he should pay £100, Lord Hardwicke treated this as a mere penalty, and decreed a specific performance.‡

Another consequence flowing from the distinction between stipulated damages and a penalty, is, that for the former, the defendant may be held to bail, but not for the latter; and therefore an affidavit which did not show what the agreement was, nor in what respects it was broken, but merely alleged an obligation to pay £50 in case of non-performance, and alleged such non-performance, was held insufficient, and the defendant was discharged.§

The French Code, like our law, enables the parties to liquidate the damages for the non-performance of the contract, and the tribunal cannot depart from the sum thus fixed.||

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\* In addition to this summary, we may call the attention of the reader to the comments on the cases contained in Evans' Pothier on Obligations, Appendix, No. 12, vol. 2, 65; in the note to *Barton vs. Glover*, Holt N. P. R., 48; and the note to *Spencer vs. Tilden*, 5 Cowen, 144, 150. The Court will not set aside or refer back an award for an objection in point of law, not apparent on the face of it; as upon a suggestion that the arbitrator improperly treated as a penalty that which by the express contract of the parties was stipulated damages. *Fuller vs. Fenwick*, 8 Man. Gr. & Scott, 705.

† *Howard vs. Hopkins*, 2 Atkyns, 871.

‡ But, on the other hand, where the defendant had underlet a church lease to the complainant, with a covenant to renew under a penalty of £70, it was held in the Irish Exchequer, and on appeal by the House of Lords, that this was not a covenant to renew, but that the party was at liberty to renew or pay the penalty. Unless the agreement was in the alternative, the decision may perhaps be questioned. *Magraw vs. Archbold*, 1 Dow, 107.

§ *Willey vs. Thornton*, 2 East, 409; *Edwards vs. Williams*, 5 Taunt., 247.

|| "Lorsque la convention porte que celui qui manquera de l'exécuter paiera une

We have thus far seen that in the actions both of debt and covenant, if the damages are not fixed the plaintiff is limited to the recovery of compensation for his real loss ; and that for the purpose of obtaining these, he is obliged to assign breaches, thus destroying even the *prima facie* force of the penalty ; and we have also considered the cases in which the sum named in the contract is treated either as a penalty or as liquidated damages. We have now to examine the further question, whether in contracts secured by a penalty, the plaintiff can recover for damages actually sustained beyond the penalty.\*

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certainne somme à titre de dommages intérêts, il ne peut être alloué à l'autre epartie une somme plus forte ni moindre."—*Code Civil*, § 1152.

The commissioners charged with preparing the codes, proposed to retain the former jurisprudence in this respect, which permitted the judge to moderate the penalty in behalf of the debtor, if it evidently exceeded the damage sustained, but gave him no power to augment it in favor of the creditor, although it might be far short of the injury suffered. These views were, however, overruled. *Toullier*, vol. vi., 287, *Des Contrats* : and *ib.*, 332, *Des Obligations ou Clauses Pénales* ; *Domat*, Book 2, 271, tit. v., sec. 2, § 15.

\* The cases bearing on this subject are the following, in England : *Lowe vs. Peers*, 4 Burr., 2225, which was covenant on a sealed contract not to marry ; *Winter vs. Trimmer*, 1 W. Bl. Rep., 395 ; *Bird vs. Randall*, 1 W. Bl. Rep., 373 and 387, 2 Esp. N. P., 279 ; *Brangemin vs. Perrot*, 2 W. Bl. Rep., 1190, on an indemnity bond against the maintenance of a bastard ; *Knight vs. Maclean*, 3 Br. Ch. R., 496 ; *Tew vs. Earl of Winterton*, 3 Br. Ch. R., 490 ; *White vs. Sealey*, Doug., 49, on a bond conditioned for the payment of rent ; *Lonsdale vs. Church*, 2 T. R., 388, overruled by *Wilde vs. Clarkson*, 6 T. R., 308, and *McClure vs. Dunkin*, 1 East, 486 ; *Harrison vs. Wright*, 13 East, 342 ; *Hefford vs. Alger*, 1 Taunt., 218 ; *Evans vs. Brander*, 2 H. B., 548 ; *Paul vs. Goodluck*, 2 Bing. N. C., 220 ; *Hellen vs. Ardley*, 3 Car. & Payne, and also the cases collected in a note thereto, 14 E. C. L. R., 187. In *Hellen vs. Ardley* it was held *ad nisi prius*, that in debt on bond for payment of money with interest, the plaintiff could only recover to the amount of the penalty, with one shilling for detention of the debt. *Buller's N. P.*, 173 ; 1 *Chitty's Pleadings*, 371. And in America, *Tunison vs. Cramer*, South R., 498 ; *Graham vs. Bickham*, 4 Dall., 143 ; S. C., 4 *Yeates' R.* ; *Harris vs. Clap*, 1 Mass. R., 308 ; *Payne vs. Ellzey*, 2 Wash. R., 143 ; *United States vs. Arnold*, 1 Gall. R., 343, 360 ; S. C., 9 *Cranch*, 104 ; *Perkins vs. Lyman*, 11 Mass., 76 ; *Smedes vs. Hooghtaling*, 3 *Caines*, 48 ; *Fairlie vs. Lawson*, 5 *Cowen*, 424 ; *Clark vs. Bush*, 8 *Cowen*, 151 ; *Cook vs. Tousey*, 3 *Wend.*, 444. In *Bank of the United States vs. Magill*, *Paine's C. C. R.*, 661, 669, in an action of debt on bond in the penalty of \$50,000 given by Magill and two sureties, conditioned for the faithful discharge of Magill's duties as cashier, *Thompson, J.*, said, "I am inclined to adopt as the better opinion, that where a bond with a penalty is given for the performance of covenants, although damages may have been sustained to a greater amount, yet the recovery must be limited to the penalty. I the more readily adopt this rule in the present instance, because it is a case of sureties. In such cases, it is peculiarly fit and proper that they should not be made liable for damages beyond the penalty. If the responsibility was without limitation, prudent and discreet men would be unwilling to become security and expose themselves to such hazard. No judgment could be formed as to the extent of the risk, nor any calculation made as to the indemnity, or counter security necessary for their protection. I do not mean to be understood as extending this rule to bonds where the condition is



Where there is a contract to do a specific act, secured by a penalty, if the penalty is not regarded as liquidated damages, the party may either demand the penalty or bring action on the covenant, and in such case recover beyond the penalty. But if this be not done, and if the penalty is recovered, it puts an end to all claim for breach of contract; and whether the penalty be paid before or after the commencement of a suit for the breach of the contract, makes no difference; and so said Lord Mansfield, in *Lowe vs. Peers*: "There is a difference between covenants in general, and covenants secured by a penalty or forfeiture. In the latter case, the obligee has his election: he may either bring an action of debt and recover the penalty, after which recovery of the penalty he cannot resort to the covenant; or if he does not choose to go for the penalty he can proceed upon the covenant, and recover more or less than the penalty, *toties quoties*."\*

The same principle, that unless the stipulated damages are to be absolutely in lieu of performance, the plaintiff may disregard them and sue for the actual damages sustained, was laid down in Pennsylvania,† where the defendant had agreed to pay \$22,318 49 for certain stock, and bound himself for the performance of the agreement in the sum of \$1,000: here it was held that this was not stipulated damages, but a penalty merely; and the plaintiff recovered £1,798 17s. 6d. "The plaintiff," said the Court, "is entitled, notwithstanding the penalty, to recover damages commensurate with the injury suffered by a non-performance."

There is a clear distinction between a covenant in which the party, affirmatively stipulating to do or to refrain from doing

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for the payment of money only. Such cases might, probably, require the application of a different rule, and depend on different principles." In the United States *vs. Arnold*, 1 Gallison, 848, Story, J., said, "Notwithstanding some contrariety in the books, I think the true principle supported by the better authorities is, that the court cannot go beyond the penalty and interest thereon from the time it becomes due by the breach."

In a case in the Queen's Bench it was said that a replevin bond is no exception to the general rule, that on a bond the plaintiff cannot recover beyond the penalty and costs of suit. *Branscombe vs. Scarborough*, 6 Q. B., 18. In a recent case in Pennsylvania, the subject was examined, and it was held that a surety in a replevin bond is not liable beyond the penalty. *Balsley vs. Hoffman et al.*, 18 Penn. State, 608.

\* 4 Burr., 2325. See, also, *Bird vs. Randall*, 1 W. Black., 273 and 337; *Winter vs. Trimmer*, 1 W. Black., 395; *Harrison vs. Wright*, 18 East, 343.

† *Graham vs. Bickham*, 4 Dall., 148.

some particular act, proceeds to secure his agreement by a penalty;\* and the common bond, which merely stipulates for the payment of a sum of money, and makes its payment depend on a condition ; for the performance of that condition there is no promise, unless one can be implied from the joint effect of the condition and penalty. And hence results the inquiry, whether in the action of *debt on bond* the damages can be carried beyond the penalty.

The question has been much agitated as to damages in gross, and also as to interest, and both as against a principal and against a surety. The American rule to be deduced from all the cases seems to be, that against a surety in *debt on bond*, nothing shall be recovered beyond the penalty;† that against the principal in that form of action, interest may be recovered beyond the penalty. While in England the penalty appears in all cases, except perhaps in Equity, to be the absolute limit. But in neither country can damages in gross be recovered, against either principal or surety, beyond the penalty.

If, on the other hand, the action of *covenant* be brought on an absolute and not a conditional undertaking, then the penalty is merely a security, and the party, whether principal or surety, may be sued as often as damage is sustained. But the question, what is an absolute and what a conditional undertaking, still remains. Does an ordinary bond imply an agreement to do the thing, on condition of the performance of which the penalty is to become void ; and can an action of covenant be brought on it ? This is an embarrassing and vexed question. Mr. Chitty says,‡ “ it seems that covenant lies on a bond, for it proves an agreement.” It is doubtful what is the purport of this language. A bond undoubtedly proves an agreement ; but is the agreement proved, the one stated in the penalty—to pay the money for which the obligee declares himself bound—or in the condition ?§ The matter is of importance, and it

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\* So Lord Ch. J. Tenterden, in his treatise on shipping, assumes that as to charter parties, damages may be recovered beyond the amount of the penalty and costs. Abbott on Shipping, Part IV., Chap. II., of the ship-owner's lien for profits, &c.

† Clark *vs.* Bush, 8 Cowen, 588. Raynor *vs.* Clark, 7 Barb. S. C. R., 581.

‡ Chitty on Pleading, Vol. I., 182.

§ Mr. Chitty cites several cases : Hill *vs.* Carr, 1 Ch. Cases, 294 ; Holles *vs.* Carr, 8 Swanst., 648, which is in fact the same ; Norrice's Case, Hardress, 178, and Com. Dig. Covenant, A. 2. The two first cases (in fact one) contain the *obiter dictum*, that “ *con-*

seems impossible, on any just construction of the instrument, to imply from the condition an absolute agreement. This is not the proper place for a more elaborate discussion of the matter, but it could not with propriety be altogether overlooked. I cannot, however, say that the opinion here advanced is supported by any judicial authority; on the contrary, in New York, the Supreme Court has clearly intimated an opinion that an action of covenant will lie on a bond to enforce the condition.\*

There may be other cases besides those which we have been just considering, where although a penalty is provided, damages at large may be demanded. So it has been held, that where by the contract of sale of certain premises a deposit was to be made, and to be forfeited, as liquidated damages, provided the agreement was not entirely carried out by the purchaser, that the plaintiff was not limited to the deposit, but might recover at large.†

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*enant lies upon a bond.*" The third was covenant on a covenant proper; the word *oblige* only being used instead of the usual phrase; and Lord C. B. Comyns, with his usual precision, says, "covenant lies, *if an agreement appear*, in an obligation." This is unquestionably true—"if the agreement appear." But in the condition of a bond to do or refrain from doing any particular act secured by a given penalty, does any agreement appear, absolutely to do the act, or to respond in indefinite damages? Practically, we well know that it is not so understood; the obligor always considers the penalty as limiting the extent of his obligation.

\* *Clark vs. Bush*, 8 Cowen, 151.

In *Martin vs. Taylor* (1 Wash. C. C. R., 1), in an action of covenant on an agreement secured by a penalty, Washington, J., said, that "where there is a penalty in an agreement under seal, the party injured may at common law sue for the whole penalty, and must be satisfied with it, or he may bring covenant, and recover in damages more or less than the penalty."

It is to be remarked here that the agreement contained an express covenant to do the act for the non-performance of which the action was brought. The case, therefore, decides nothing as to the main point, whether covenant can be brought on a bond upon an agreement contained in the condition, and whether in such suit damages can be assessed beyond the penalty.

† *Icely vs. Grew*, 6 Nev. & Man., 441.

## CHAPTER XVII.

### SET-OFF AND RECOUPMENT OF DAMAGES.

No Set-off at Common Law—Introduced by the Courts of Equity—Statutes on the subject—Original meaning of Recoupment—Cases in England—Where suit brought on the original contract; or on a Bill or Note given under it—Where Fraud set up—Necessity of notice—American signification of the term—Cases in this country—Payment after suit brought.

BEFORE we leave the examination of compensation in actions of contract, we have to consider the principles upon which an acknowledged right for redress or remuneration is reduced in its amount by the establishment of an adverse or counter claim, which is taken into consideration in the same suit, to use technical language, by way of set-off or recoupment. An analogous rule exists in regard to actions of tort, where, however, it is known by the term mitigation.

The doctrine of set-off is so fully treated in the various treatises devoted to that particular subject, that it would be improper to do more than allude to it here. It is sufficient to say, that at common law no right of set-off existed, it being the object of the system to confine every suit to the particular subject of litigation which gave rise to it. The courts of equity, however, in this, as in many other cases, lent a ready ear to the appeals made to them from the narrow remedies and harsh doctrines of the common law, and to prevent circuity of action and multiplicity of litigation, introduced the principle of set-off, a principle well known to the civil law by the name of compensation.

This doctrine, which is nothing more than a system of settling cross demands in one suit, finally appeared so equitable, that legislation was resorted to, to get rid of the necessity of applying to a court of equity; and the principle of set-off is

now fully established in both American and English legislation. It is unnecessary here to enter upon an examination of the various statutes of set-off; it is sufficient to say, that, as a general rule, where adverse or counter claims of a pecuniary character exist between the same parties, and the demands are liquidated, the principle is applied.

But the object of the statutes of set-off is to settle mutual accounts and debts. Wrongs or torts done, and unliquidated damages claimed, have never been permitted to be set-off.\* And unliquidated damages have been defined as follows: "Unliquidated damages are such as rest in opinion only, and must be ascertained by a jury, the verdict being regulated by the peculiar circumstances of each particular case, which cannot be ascertained by computation or calculation, as damage for not using a farm in a workmanlike manner, for not building a house in a good and sufficient manner, on warranty in the sale of a horse, for not skillfully amputating a limb, and other cases of like character."†

In Illinois, however, unliquidated damages arising out of contract, express or implied, may be set off in actions *ex contractu*, unless they are totally disconnected with the plaintiff's cause of action.‡

The same reasons which operated to introduce the original doctrine of set-off, have tended to enlarge it; and the severity of the statute has introduced the practice of *Recoupment*. Recoupment, or as it was originally called, Recouper, is a very ancient term of our law, but had at one period fallen into considerable disuse. It has been recently revived in this country, with, however, a material modification of its meaning.

As far back as the reign of Henry VIII. § we find it laid down, "If a man disseise me of land, out of which a rent charge is issuant which has been in arrear for several years, and the disseisor pay it, if the disseisee recover in an assize,

\* *Butts vs. Neilson*, 18 Wend., 156; *McDonald vs. Neilson*, 2 Cowen, 140; *Hick vs. Sheener*, 4 Serg. & R., 249; 10 S. & R., 14; *U. S. vs. Robison*, 9 Pet., 825; *U. S. vs. Buchanan*, 8 Howard, 88; *Howlet vs. Strickland*, Cowp., 56; *Freeman vs. Hyatt*, 1 W. Black., 384.

† *Butts vs. Collins*, 18 Wend., 189.

‡ *Sargeant vs. Kellogg*, 5 Gilman, 278; *Kaskaskia Bridge Co. vs. Shannon*, 1 Gilman, 15.

§ *Dyer's Reports*, 2, b.

the rent that the disseisor has paid, shall be *recouped in damages*." Lord Coke also says,\* "If a man makes a lease for life rendering rent, or if there be lord and tenant by fealty and rent, and the rent is behind two years, and afterwards the lessor, or the lord, disseises the terre-tenant, and afterwards the tenant recovers against him in an assize, and the rent which incurred during the disseisin is *recouped in damages*, yet the lord or lessor shall recover in the assize the arrearages before the disseisin, and the bar of the later years is no bar of the arrearages before." And so he again says:† "And as to the case of *recouper in damages* in the case of rent service, charge or seck, it was resolved that the reason of the recouper in such case is, because otherwise, when the disseisee reënters, the arrearages of the rent service, charge or seck would be revived; and therefore to avoid circuitry of action—and *circuitus est evitandus, et boni judicis est lites dirimere, ne lis ex lite oriatur*—the arrearages during the disseisin shall be *recouped in damages*."‡ So, again,§ where an appeal of maihem was brought, and for the defense it was urged that the plaintiff had recovered in a previous action of trespass in assault and battery, and it was held a good bar, it is cited in the index as a case "where *recouper* of damages shall lie, because the plaintiff recovered in another action before."¶ And again,¶ if the feoffee or lessee of the second disseisor, sows the land, or cuts down trees or grass, &c., and carries away, yet after the regress of the disseisee, he may take as well the corn as the trees, &c., to what place soever they are carried; and if the disseisee takes them, they shall be *recouped in damages* against the disseisor.\*\*

\* Pennant's Case, Rep., Part III., 65.

† Coulter's Case, Rep., Part V., 2, 31.

‡ And in this case it was held, that an executor *of his own wrong* could not recoupe or retain out of goods in his own hands the amount of a debt due him by the decedent. In the case, however, above cited from Dyer, it was held that executors might pay the debts of the testator out of their own money, and retain so much of the effects of the testator as would be necessary to satisfy them; and this was held good under a plea of *plene administraverunt*.

Other cases of recouper or retention will be found referred to in this (Coulter's) case, chiefly from the Year Books. See, also, as to Recouper, a note to the case of Icely vs. Grew, 6 Nev. & Man., 467; 38 E. C. L. R., 440.

§ Part IV., 48. Cases of Appeals, &c.

¶ So again in Slade's case, Part IV., 94. But this is not a case of former recovery.

¶ Richard Liford's case, Part XI., 51 and 52.

\*\* And in the same sense the maxim of the civil law is applied: *nemo locupletior*

In this same sense the phrase is used in a modern English case, where\* suit was brought upon a policy on the life of Mr. Pitt. The plaintiffs had been creditors of Mr. Pitt, and insured his life for their own protection. After his death, however, the debt was paid by his executors out of moneys voted by Parliament to relieve his estate, and it was held that the plaintiffs could not recover, having received no damage; and in the case next cited, Lord Ellenborough likened this to a case of recoupment.†

So where an action‡ was brought on a policy of insurance to Russia, with a provision, that if the cargo were denied permission to be landed, the master should, on his return, receive in London, £2,500—the outward cargo was denied landing, but the master, instead of returning direct, went by Stockholm and earned freight. The plaintiff claimed to recover the £2,500, but it was held that the freight earned was to be *recouped*; and the principle of this case has been recognized in this country.§

Again, in a case of assumpsit by underwriters| on freight, after abandonment and payment of total loss, to recover freight earned after the abandonment, it was insisted by counsel *arguendo*, that whether entitled under the abandonment or not, the plaintiff ought to have his damages *recouped pro tanto*, out of the freight earned by the defendants on the homeward voyage.¶

*faciendus est ex aliena jactura.* So Grotius: "*Minus autem quis habere ac proinde damnum fecisse intelligitur, non in re tantum, sed in fructibus qui propria rei fructus sunt, sive illi percepti sunt sive non, si tamen ipse eos percepturus fuerat, deductis impensis quibus res melior facta est aut quæ ad fructus percipiendos fuerunt necessaria, ea regula quæ nos velat locupletiores fieri cum aliena jactura.*"—De Jur. Bel. et Pac., Lib. II., C. cxvii.; § 4. Rutherford's Institutes, Book I., ch. 17.

\* *Godsall vs. Boldero*, 9 East, 72. See this case cited with approbation in the Court of Errors in New York, *Tyler vs. Atna Fire Ins. Co.*, 16 Wend., 385.

† Mr. Ellis says (*Insurance*, 126), that notwithstanding this decision, the office paid the amount before leaving court. It does not appear, but it may be supposed that the suit was brought for the benefit of the estate.

‡ *Pullen vs. Staniforth*, 11 East, 282.

§ *Hecksher vs. McCrea*, 24 Wend., 304. See, also, *Cortigan vs. Mohawk and Hudson R. R. Co.*, 2 Denio, 610.

| *Barclay vs. Stirling*, 5 M. & Sel., 6 and 10.

¶ See, also, *Richardson arguendo*, in *Williams vs. London Ass. Co.*, 1 M. & Sel., 318 and 322. And such is the definition given of the word in the Lexicons; "*Recoupe*," says Jacobs (in Voc.), "from the French *Recouper*, signifies the keeping back or stopping something which is due, and in our law, we use it for *default* or *discount*."

Thus, it is evident that *recouper* or *recoupment*, in its original sense, was a mere right of deduction from the amount of the plaintiff's recovery on the ground that his damages were not really as high as he alleged.\*

But this is not the sense in which the phrase has been lately used with us in this country. In Mr. Barbour's valuable compilation on the law of Set-off, he says, p. 26: "Before entering upon the subject of set-off more minutely, it will be proper to notice a species of defense somewhat analogous to it in character, which a defendant is in some cases allowed to make, and which is called *recoupment*. This is where the defense is not presented as a matter of set-off arising on an independent contract, but for the purpose of reducing the plaintiff's damages, for the reason that he himself has not complied with the cross obligations arising under the same contract. Thus, in an action to recover compensation for services rendered, the employer is entitled to show by way of *recoupment* of damages, loss sustained by him through the negligence of the person employed; and so in regard to a breach of warranty."

Mr. Barbour is unquestionably right in the fact he states, that *recoupment* is thus used, but it is equally certain that this is an entirely new application of the word; and that while it originally merely implied a deduction from the plaintiff's demand, arising from payment in whole or in part, or from recovery or some analogous fact, it is now understood to embrace counter claims of the defendant, and to be in short a kind of irregular and unliquidated set-off, which has crept in notwithstanding the rigorous terms of the statute. It is always desirable to use technical terms in their strict signification; but leaving this to those who alone are competent to set us right in the matter, I propose now to consider the law of recoupment in its broader, and, as I must think, less correct interpretation. It will be better understood from a careful examination of the cases.

It was originally held in England, that in actions for work

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The term *default* is obsolete, and is only known now through the substantive *defaultion*, used in promissory notes in Pennsylvania to signify deduction; and discount has become appropriated almost exclusively to banking operations.

\* And so, too, it appears from Viner's Abridgment, where various uses of the term in its ancient sense, will be found under the head of Discount; Pl. 3, 4, 9 and 10.



and labor, negligence or badness of materials constituted no defense to an action for the stipulated sum; that the plaintiff was entitled to his contract price, and that the defendant must resort to his cross action for the damages resulting from the negligence.\* But this law was very soon overruled.

In an action of assumpsit for work and labor,† the plaintiff, a carpenter, had been employed by the defendant, a farmer, to do some work to his farm buildings; no particular sum had been agreed on. The defendant offered to prove that the work had been done in an improper and insufficient manner. To which it was replied on behalf of the plaintiff, that this was no answer to the present action, but the subject of a cross-suit; and at nisi prius it was so ruled, and the plaintiff had a verdict for his full demand. But on motion for a new trial, this was held wrong; and Lord Ellenborough, C. J., said:

“Where a *specific sum* has been agreed to be paid by the defendant, the plaintiff may have some ground to complain of surprise, if evidence be admitted to show the work and materials provided were not worth so much as was contracted to be paid, because he may only come prepared to prove the agreement for the specified sum and the work done, unless notice be given to him that the payment is disputed on the ground of the inadequacy of the work done. But where a plaintiff comes into court upon a *quantum meruit*, he must come prepared to show that the work done was worth so much, and therefore there can be no injustice in suffering the defense to be entered into, even without notice.”

Lawrence, J., said, “If even a *specific sum* had been agreed to be paid, and notice given, then the defendant should be let into the defense. For after all, considering the matter fairly, if the work stipulated for at a certain price were not properly executed, the plaintiff would not have done that which he engaged to do, the doing which would be the consideration of the defendant's promise to pay, and the foundation on which his claim to the price stipulated for would rest; and therefore, especially if he should have notice that the defendant resists payment on that ground, he ought to come prepared with proof that the work was executed properly;” and the rule for a new trial was made absolute.

Shortly afterwards, in an action‡ of assumpsit for work and labor, plea non-assumpsit, the defendant showed that the work, (the rebuilding the front of a house) was ill done; to which it

\* Brown *vs.* Davis; Duffit *vs.* James; Cormack *vs.* Gillis; and Morgan *vs.* Richardson, cited in Basten *vs.* Butter, 7 East, 479.

† Basten *vs.* Butter, 7 East, 479, (1806), and 483.

‡ Farnsworth *vs.* Garrard, 1 Camp., 88, (1807).

was insisted that the only remedy was by cross action. But Lord Ellenborough said, "The plaintiff is to recover what he deserves. \* \* I have had a conference with the judges; and I consider this as the correct rule, that if there has been no beneficial service, there shall be no pay; but if some benefit has been derived, though not to the extent expected, this shall go to the amount of the plaintiff's demand, leaving the defendant to his action for negligence;" and there was a verdict for defendant.

Again,\* where the plaintiff declared on a contract by which the defendants were to furnish beer to be shipped for Gibraltar, and alleged by way of breach, that the beer was bad and wholly unfit for shipment, it appeared that the defendants had previously paid the plaintiffs for the price of the beer, in a suit in which judgment had been allowed to go by default. Lord Ellenborough said, "It appears to me that you should have made your defense to the original action, and given in evidence the bad quality of the article supplied either as an answer to the whole demand, or in abatement of the damages. There was formerly an opportunity to do final justice between the parties, and why should there now be a second litigation?"†

A distinction was originally taken in England between actions brought for the original contract price, and suits founded on a bill and note given for the price, as we have seen above in *Basten vs. Butter*. So in two cases at nisi prius,‡ Lord Ellenborough refused to admit evidence in actions on bills of exchange to show that the consideration had partially failed, the provisions for which the bills were given being very inferior to what they should have been. In the latter case, he said, "a bill of exchange cannot be accepted on a quantum meruit. There is a difference between want of consideration, and failure of consideration. The former may be given in evidence to re-

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\* *Fisher vs. Samuda et al.*, 1 Camp., 190, (1808).

† The cause was allowed to go on, but turned on another point. In *Lewis vs. Cosgrave*, 2 Taunt., 2, (1809), the ingredient of fraud was superadded. It was a suit brought on a check for £15, which had been given for a horse warranted sound, and which the plaintiff knew to be unsound. At the trial, Heath, J., held that the defendant was bound to pay the bill, and bring his action for the deceit; but on a motion for a new trial, the court held, "that it was clearly a fraud; and as a man cannot recover the price of goods sold under a fraud, the rule for a new trial should be made absolute."

‡ *Morgan vs. Richardson*, 1 Camp., 40, *in notis*, and *Tye vs. Gwynne*, 2 Camp., 246.

duce the damages; the latter cannot, but furnishes a distinct and independent cause of action;" and he cited with approbation, the opinion of Mr. Justice Denison, in *Robinson vs. Bland*:\* "There is a distinction between the contract and the security. If part of the contract arises on a good consideration, and part on a bad one, it is divisible. But it is otherwise as to the security, that being entire." This distinction, however, we shall see has been disregarded in the State of New York.

In other respects, also, the earlier English decisions were inharmonious. In an action† brought to recover the amount of a surgeon's bill, Lord Kenyon permitted the defendant to give evidence of unskillful treatment of him by the plaintiff, taking the distinction between a demand for skill, where the question might be whether the plaintiff was entitled to any thing or nothing; and where the action was for goods sold and delivered, or other certain thing of value, not depending on skill; and considering the case before him as a mixed question, where the demand was in part for skill and part for medicine.

But the Court of Common Pleas held,‡ that in an action on an attorney's bill, negligence could not be set up as a defense, unless possibly it was such as to deprive the defendant of all possible benefit. The negligence consisted in neglecting to oppose the justification of bail. The bail had been proceeded against, but fruitlessly. Sir James Mansfield, C. J., said,

"In declaring that the plaintiff is entitled to recover, I do not go the length of saying that in no case of this kind can negligence in the party suing be used as a defense to the action; though I think it can only be used when the negligence has been such, that the party for whom the work was done has thereby lost all possibility of benefit from such work. That cannot be said in the present case." And final judgment was given for the plaintiff.

In this country, the subject has been much considered, and mainly with reference to three points: where the defense is mere failure of consideration; where it reaches a charge of fraud; and where notice of the proposed defense will be required. In New York, the question seems first to have been agitated in a case§ where the plaintiff below, Scriven, sued the

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\* 2 Burr., 1082.

† *Duffit vs. James*, cited in *Basten vs. Butter*, 7 East, 479, (1788).

‡ *Templer vs. McLachlan*, 5 Bos. & Pull., 186, (1806).

§ *Jones vs. Scriven*, 8 J. R., 858.

defendant Jones, in a justice's court, in an action of deceit and warranty on the sale of the art of manufacturing potashes in a new and improved mode. The defendant offered in evidence a former judgment\* rendered in a suit by Jones against Scriven, on a note given by Scriven for the art of making potashes in question; and where, after evidence on the point as to the value of the patent, judgment was given for Jones on the note. On this proof of the judgment in the former suit, the defendant below moved for a non-suit, which was overruled, and a verdict found for the plaintiff. This judgment being brought up by *certiorari* to the Supreme Court, was reversed, on the ground that the very question between the parties, viz. the value of the patent, was decided in the first suit; and the court by implication held, that in the first suit on the note, the evidence to show the want of consideration was admissible.

Again,† where the same question that had been agitated in *Templer vs. McLachlan*, came up before the Supreme Court of New York, the testimony showing the negligence of the plaintiff, as attorney, was admitted in the Common Pleas, and a verdict found and judgment rendered for the defendant. When the case came up on error, the court expressed doubts as to the general rule, but thought the judgment below should be reversed on another ground, that of want of notice. They said, "The defendant neither pleaded nor gave notice of this defense; and it must have been a complete surprise upon the plaintiff, as he cannot be presumed to have come prepared to meet it at the trial."‡

Where§ suit was brought on two notes given for the purchase money of land conveyed with warranty, but the title to which had proved bad, the court held that the consideration had

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\* The text uses the word "trial," but the marginal note has the words "trial and judgment," and so it should evidently be.

† *Runyan vs. Nichols*, 11 J. R., 546.

‡ In *Hopping vs. Quin* (12 Wend., 517), it was held, without any reference to the question of notice attached to the plea, that an attorney could not recover in an action of assumpsit for his fees, when the suit which he had been retained to bring had been so negligently managed that his services were worth nothing. But in *The People ex rel. Fleming vs. Niagara C. P.* (13 Wendell, 246), the necessity of notice in case of a partial failure of consideration was insisted on.

§ *Frisbee vs. Hoffnagle*, 11 J. R., 50. But in *Whitney vs. Lewis*, 21 Wend., 181, and *Batterman vs. Pierce*, 8 Hill, 176, it has been said that *Frisbee vs. Hoffnagle* is overruled. See, also, *Lamerson vs. Marvin*, 8 Barbour S. C. R., 9.

totally failed, and that this was a good defense to the suit. The question came up again in a case which resembled *Lewis vs. Osgraves*, in so far as it involved a fraud.\* It was an action of assumpsit for the price of a mare, represented by the plaintiff to be sound, but which the defendant offered to prove he knew to be diseased. The defendant gave notice of the defense, but the Common Pleas rejected the evidence, and the plaintiff had judgment. The Supreme Court, however, held the defense improperly excluded :

"The defendant below apprised the plaintiff of his intention to rely for his defense at the trial upon the fraud; and the established rule now appears to be that, in cases like the present, fraud may be given in evidence as a defense, and will be an answer to the whole demand, or in abatement of the damages, according to the circumstances of the case. This is the line, as well as a statutory rule, and well calculated to do full and complete justice between the parties, most expeditiously and least expensively."

And the judgment was reversed.†

\* *Beecker and Beecker vs. Vrooman*, 18 J. R., 302.

† So, again, in another case of fraud, *Sill vs. Reed*, 15 J. R., 220. It was an action of assumpsit on two notes given in payment for a shearing machine. The general issue was pleaded. The defendant offered to prove that the plaintiff falsely represented the machine to be of great value, when in fact it was worth nothing, and also a breach of warranty as to the value and utility of the machine. Mr. J. Spencer, before whom the cause was tried, excluded the evidence, on the ground that neither fraud nor breach of warranty, although they went to take away the whole cause of action, could be given in evidence under the general issue of non-assumpsit, without notice. Verdict for the plaintiffs. On motion for a new trial, the court held the evidence improperly excluded, and a new trial was granted.

In *Hills vs. Bannister*, 8 Cow., 81, the question as to the admissibility of proof of a partial failure of consideration without fraud, was mooted, but not decided. It was an action of assumpsit on a promissory note. Plea, the general issue only. The defendant offered to prove that the note was given for a church bell purchased of the plaintiffs, which they covenanted in writing not to crack for one year, and to re-cast it if it should crack in that time; that it did crack within the year, and that the plaintiffs had not re-cast it, having removed, and the defendant not being able to find them. The plaintiffs objected to the evidence, on the ground that no notice accompanied the plea, and it was excluded. A verdict was found for the plaintiffs, subject to the opinion of the court.

The Supreme Court held the evidence of a refusal to re-cast the bell insufficient, and on this ground gave judgment for the plaintiffs, and in giving judgment said, "It seems that if the unsoundness of an article merely produced a partial diminution of value, it may be shown in mitigation of damages provided there was a fraudulent misrepresentation. If the plaintiffs had refused to cast the bell, I incline to think that the partial failure of consideration might also be a defense in mitigation, although there be no fraud." But the point was left undecided.

So, again, in a case of fraud.\* It was an action of assumpsit on a promissory note. Plea, the general issue. The defendants proved that the note was given for the price of a mare sold them by the plaintiff, and that the plaintiff was guilty of deceit, falsely representing her to be sound, when in fact she had a disease of which she afterwards died. The judge received the testimony, deciding that if the mare *was entirely without value*, the evidence was admissible, but if she was of some value, the evidence was not proper; and the question of value he submitted to the jury. The jury found for the plaintiff the amount of the note. The Supreme Court upon the argument of exceptions to the charge, held that the defendants could not say that the horse was valueless, nor treat the sale as void, because they had retained the property; that in order to put themselves in a situation to do that, they should have returned the mare when they discovered the falsity of the representation; and a new trial was denied.

Again, where Button sued Grant† for not doing work, as a carpenter, in a workmanlike manner. The defendant pleaded the general issue, and a former action by him as plaintiff, for his pay for the same work. It was proved that on the former action the plaintiff in this suit offered evidence that the work was unskillfully done, but that the justice excluded the evidence, and gave judgment for the then plaintiff, on the ground that the defendant was bound by his bargain. On this evidence judgment was given by the justice in this suit for the defendant in error, (the plaintiff below, Button.) But on *certiorari*, the Supreme Court said that the plaintiff was barred by the former judgment, and that the justice erred in refusing to admit the evidence in the former suit; and the judgment was reversed.

Where Clark,‡ as administrator of A. Clark, sued the defendants in a justice's court for fees due the intestate as attorney and counselor, the justice non-suited the plaintiff, and he appealed to the Common Pleas. The intestate, A. Clark, was employed to prosecute two suits, in which judgment was given as in case of non-suit for not proceeding to trial. The defend-

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\* *Burton vs. Stewart*, 8 Wend., 286 (1829), and *Spalding vs. Vandercook*, 2 Wend., 481.

† *Grant vs. Button*, 14 J. R., 877.

‡ *Gleason & Viele vs. Clark*, Adm'r of Clark, 9 Cowen, 57.

ants below insisted that the non-suit was produced by the negligence of the intestate, which went of course to the whole cause of action; but the Common Pleas decided that the evidence of negligence could not be received under the plea of the general issue, and thereupon gave judgment for the plaintiff below. On error, the Supreme Court held the decision erroneous as to the evidence of negligence, and said "that under the plea of the general issue the defendant may show that the plaintiff never had any cause of action; if this species of defense goes to destroy the plaintiff's claim entirely, it is proper under the general issue; if merely to reduce the damages, notice should be given." But, on the ground that the plaintiff's evidence did not show a joint retainer by the defendants, the judgment was reversed.

In an action\* of assumpsit on a promissory note, the defendant pleaded the general issue, with notice that the consideration of the note was the making of a quantity of provision barrels under an agreement to manufacture them according to the inspection law relative to beef and pork, and that a portion of the barrels were manufactured in an unskillful manner, whereby damage had accrued. The circuit judge excluded the evidence; and a verdict was given for the plaintiff, for the amount claimed; but the Supreme Court held the exclusion improper, and a new trial was ordered.

Soon after, in the same State, the subject we are now considering was largely discussed,† and the rule definitively settled. The plaintiff, a stove dealer, sued the defendant for the price of a patent cooking-stove, and sundry other articles. The defendant gave notice with his plea, that he would prove that the plaintiff warranted the stove to draw and cook well; that it did not answer the warranty; that he had offered to return it; but that the plaintiff refused to take it back. It was not pretended that there was any fraud. This evidence was rejected, on the ground that unliquidated damages for a breach of warranty cannot be set-off (no fraud being shown) in an action of assumpsit. The jury found for the plaintiff his whole demand. Judgment and error. It was contended in the Supreme Court,

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\* Spalding *vs.* Vandercook, 2 Wend., 481.

† McAlister *vs.* Reab, 4 Wend., 488, and Reab *vs.* McAlister, 8 Wend., 109, in Error.

for the defendant in error, that a partial failure of consideration, unless occasioned by the *fraud* of the plaintiff, could not be given in evidence in reduction of the damages. But Mr. J. Marcy, in delivering the opinion of the court, said, (p. 492)

"From an examination of the cases, I am satisfied that in those where the damages arising from a breach of warranty in the sale of chattels have been allowed to be given in evidence by the defendant to reduce the amount of recovery below the stipulated price, the decisions of the court have not proceeded on the ground that the express contracts were void by reason of fraud; and that the recovery was had upon a *quantum meruit*, or *quantum valebat*, upon implied contracts, but upon a principle somewhat different from either of those adverted to in this case by the court below—upon a principle which has of late years been gaining favor with courts, and extending the range of its operations. Such defense is permitted, to avoid *circuitry of action*. A second litigation on the same matter should not be tolerated when a fair opportunity can be afforded by the first to do final and complete justice to the parties. If a defense resting on such a principle is allowed, as I think it is in a case of warranty *mala fide*, I see no good reason for not allowing it in a case of warranty *bona fide*. The effect would be as salutary, and the inconveniences arising therefrom would be as few, in the one case as in the other. The distinction contended for on the part of the defendant here is recognized, I admit, in many cases, and some of high authority; but in others, and those mostly of a more recent date, it seems to me to have been disregarded." \* \* \* "I am persuaded that if we should circumscribe the operation of the rule in the manner contended for by the defendant in error here, we should limit its usefulness; but by extending it to cases of sale on warranty without fraud, we shall thereby curtail litigation, without creating confusion by encroachments upon established principles of law. I am therefore of opinion that the court below erred in refusing the evidence offered by the defendants." And the judgment was reversed.

The same case came up before the Court of Errors;\* when Mr. Chancellor Walworth, in giving his reasons for affirmance, said,

"I consider the rule adopted on this subject perfectly just and equitable, when the plaintiff has notice of the defense intended to be set up, and calculated to do complete justice between the parties, without putting them to the expense of two suits when one is much more likely to effect the object of fair litigation. Indeed, if one of the parties is insolvent, and the other responsible, it is the only way in which justice can be done; at least as to small demands

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\* Reab vs. McAlister, 8 Wend., 109 and 117.



which will not bear the expense of a suit in chancery to obtain an equitable set-off."

He also said that the distinction taken in England between a suit on the original contract and a suit upon a note or any other security taken for the contract price, had not been adopted by the courts of New York. The judgment was affirmed.\*

In a subsequent case† in the same court, where suit was brought for breach of warranty in a sale of a horse, it was shown that the plaintiff had given his note for the price of the same horse and paid it after suit, and it was objected that the evidence of breach of warranty should have been urged in that suit; the court held that the evidence would have been admissible, but that the now plaintiff was not bound to use it, and that the fact of his not having availed himself of it, was no bar to the present suit.

Where covenant‡ was brought on a sealed agreement to build a certain wall for \$1,500, the defendant offered to show that the work was not equal in quality to what the contract required. The referees rejected the evidence, and for that reason the report was set aside. The court said, "The offer came under the category of recoupment. Recoup is synonymous with defalc or discount. It is now uniformly applied where a man brings an action for a breach of contract between him and the defendant, and the latter can show that some stipulation in the same contract was made by the plaintiff, which he has violated: the defendant may, if he choose, instead of suing in his turn, recoup his damages arising from the breach committed by the plaintiff, whether liquidated or not."

And so in an action for use and occupation, if the defendant be entitled to damages on account of the tenement not being

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\* In *Still vs. Hall*, 20 Wend., 51, the principle settled in *Reab vs. McAlister*, was applied to the case of a master of a sloop; and in an action of assumpsit, brought by such a master for his wages, it was held competent for the owners to "recoup" the damages sustained by them in consequence of the plaintiff's negligence, in laying the sloop in such a way that she was run into and sunk; and the referees having rejected the evidence, their report was set aside.

In *Blanchard vs. Ely*, 21 Wend., 842, in an action brought to recover the price of a steamboat, the doctrine of *Reab vs. McAlister*, "that proof of any damages arising from a plaintiff's breach of the contract on which he sues, may be received to reduce his claim," was again recognized.

† *Cook vs. Mosely*, 18 Wend., 277.

‡ *Ives vs. Van Eps*, 22 Wend., 155.

repaired, they may be set up by way of reducing or extinguishing the rent.\* And so, too, in the action of replevin after distress for rent. But not under a plea of eviction.† Nor can mere tortious acts of the landlord, wholly independent of the covenants of the respective parties, be set up as a defense.‡

So, too, in an action for rent, fraud can be set up by way of recoupment. In a subsequent case in the Supreme Court of New York, where suit was brought for rent, it was shown that the defendant was induced to sign the lease through the fraudulent representations of the plaintiff that the lot comprehended a certain parcel of land, which proved to belong to the corporation of the city of New York. It was held, that he had a right to recoup the damages resulting from the fraud, and that they were, at least, the rent which he had to pay for the corporation property.§

The subject was recently considered in an action| brought on a promissory note given for wood which had been destroyed by reason of the payee of the note having burned over a piece of fallow ground adjacent to the lot where the wood lay, and against the consequences of which, at the time of the giving of the note, he had undertaken to guaranty the defendants. At the trial, the circuit judge excluded the evidence which was offered as a defense to the note. But on a motion for a new trial, this was held erroneous, and Bronson, J., said, "It is not a question of set-off, as the plaintiff's counsel seems to suppose, but of recoupment of damages. When the demands of both parties spring out of the same contract or transaction, the de-

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\* *Westlake vs. Degraw*, 25 Wend., 669. The landlord, however, is not bound to repair, except by virtue of an express covenant; and it has been repeatedly held that even a failure of the landlord to comply with his covenant furnishes no answer to a suit for the rent. *Etheridge vs. Osborn*, 12 Wend., 529. But on principle this might be, as the bargain, though expressed in separate covenants, is contained in one instrument, and made at the same time. See *Dorwin vs. Potter*, 5 Denio, 304, where, in assumpsit for rent, the defendant was allowed to recoup his damages for want of repairs. And it is worthy of attention, that in *Tone vs. Brace*, 8 Paige, 597, the Chancellor appeared to consider the doctrine of recoupment had reached far enough to cover in this way distinct covenants under seal.

† *Nichols vs. Dusenbury*, 2 Comstock, 283.

‡ *Cram vs. Dresser*, 2 Sandford S. C., 120.

§ *Allaire vs. Whitney*, 1 Hill, 484; and see, also, *Whitney vs. Allaire*, 1 Comstock, 805.

| *Batterman vs. Pierce*, 8 Hill, 171. See this case commented on in *Cram vs. Dresser*, 2 Sandford S. C., 120.

fendant may *recoup*, although the damages on both sides are unliquidated ; but he can only *set-off* when the demands of both parties are liquidated, or capable of being ascertained by calculation." It was further urged that the damages claimed by the defendant did not spring out of the contract of sale, but arose under the collateral agreement of the plaintiff to indemnify against the fire. But while the court admitted "that there could be no recoupment by setting up the breach of an independent contract on the part of the plaintiff," still here the bargain was held to be one and the same.\*

So when a horse hired to perform a certain journey, becomes disabled while on his return, without fault on the part of the hirer, so that he is unable to travel, and the hirer is thereby compelled to procure other means of returning home and to incur expenses in consequence thereof, those expenses may be recouped against the bailor in an action for the hire of the horse, even to the full extent of the price agreed for his hire.†

Where suit was brought‡ by a banking association, on a note secured by pledge of stock, it was suggested that an irregular or prejudicial sale of the pledge might be taken advantage of under the doctrine of recoupment ; but the point was not decided, and it would certainly be a great extension of the doctrine, and would occasion an inquiry often very embarrassing and entirely foreign to the original cause of action.§

Again, recently the general doctrine has been repeatedly re-affirmed, in cases of contract,|| and also in cases of fraud. In a case of fraud in the sale of land,¶ the general doctrine was thus laid down. The case was an action of debt on bond. The defendant offered to prove that it was given in part pur-

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\* "In two cases," said the court, "*Tuttle vs. Tompkins*, 2 Wend., 407, and *Sickels vs. Fort*, 15 Wend., 559, this doctrine has been lost sight of. The truth is, that the doctrine, although founded on the plainest principles of justice, is not of very long standing; but the principle is now too firmly settled to be shaken by a few straggling cases, or the occasional dicta which seem to look in the opposite direction."

† *Harrington vs. Snyder*, 3 Barbour's S. C. R., 380.

‡ *Willoughby vs. Comstock*, 3 Hill, 389.

§ In *Taggard vs. Curteneus*, 15 Wendell, 155, a defense substantially of this character was overruled.

|| *The Mayor of Albany vs. Trowbridge*, 5 Hill, 71; affirmed in *Error*, 7 Hill, 429. *Barber vs. Rose*, ib., 76. *Whitbeck vs. Skinner*, 7 Hill, 58; and see, also, *Judd vs. Denison*, 10 Wend., 512.

¶ *Van Eps vs. Harrison*, 5 Hill, 63. See, also, *McCullough vs. Cox*, 6 Barb. S. C. R., 386.

chase for land which the plaintiff had fraudulently and falsely represented to be very different from what it was. Bronson, J., said, that under the statute (2 R. S., p. 406, § 77) which declares, "that a seal shall only be presumptive evidence of a sufficient consideration, which may be rebutted in the same manner and to the same extent as if the instrument were not sealed," the defendant would be allowed to recoup damages in an action upon a sealed as well as on an unsealed instrument.\*

Nor is the party entitled to recoup—as for instance the maker of a note given for the price of goods, who seeks redress for the non-delivery at the stipulated time—denied this relief because he has commenced a suit against the seller; but he will be obliged to elect between his own suit and the recoupment.†

So in Alabama, a defendant by electing to recoup the damages when sued for a breach of contract, thereby precludes himself from afterwards suing for damages.‡

The doctrine does not appear always applicable to real estate. Thus, where a promissory note was given in consideration of the conveyance of certain premises, and the defendant was let into possession, but the plaintiff refused to convey, the Court of King's Bench held the refusal to be no defense to an action on the note, saying that the consideration had not wholly failed.§ And the same principle has been recognized in this country.||

In regard to chattels generally, this case cannot arise, because there is no evidence of title necessary. But in regard to vessels, where a bill of sale is requisite, the same question might present itself. As above presented, the decision just cited seems correct, because there was no allegation of damages sustained by the refusal to complete the transfer. But if such mischief as the loss of a good offer were to result, it would seem that it should constitute a defense *pro tanto*.

I have reviewed the above cases somewhat in chronological order, because the doctrine is one of recent growth; and in New York it may now be safely said, that, whether in cases of

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\* And see to same point, *Lamerson vs. Marvin*, 8 Barb. S. C. R., 9.

† *Fabricotti vs. Launitz*, 8 Sandf. S. C. R., 748.

‡ *McLane vs. Miller*, 12 Ala., 648.

§ *Moggridge vs. Jones*, 8 Camp., 88, and 14 East, 486.

|| *Freligh vs. Platt*, 5 Cowen, 494; and *Greenleaf vs. Cook*, 2 Wheaton, 18.

sales of chattels, contracts for labor and materials, or for professional services, whether the action be for the original contract price, or on a security given therefor, and also in actions for rent, it is competent for the defendant to give in evidence in diminution or recoupment of damages, any fraud, breach of warranty, or negligence, growing out of and relating to the particular thing in question by which he has been injured, and the whole matter is to be submitted to the jury. For damages not arising, however, out of the contract of the parties, and entirely independent of their respective covenants or agreements, there can be no recoupment; and so in an action for rent upon a lease which provided for the landlord's entering on the premises to make repairs during the term, the tenant cannot recoup damages occasioned by negligent and tortious behavior of the landlord and his servants in making such repairs.\*

So where there are distinct sales, they cannot be regarded as one transaction, so as to entitle the defendant in an action for the price of the last parcel delivered to recoup his damages growing out of the previous deliveries.† Nor can there be any recoupment of damages sustained subsequent to the commencement of the suit.‡

As to the way in which the defense of recoupment is to be set up, it is now settled that evidence to support it if total and going to the whole action will be received under the general issue, but that where it is only partial it cannot be pleaded, and notice must be given with the plea. In New York the courts hold "notice to be an essential part of the rule."§

This, too, appears decided in New Hampshire;|| and in most of our sister States the general rule seems to be settling down as in New York, with, however, considerable fluctuation.

On the Massachusetts circuit, before Story, J., where snit¶ was brought on a special contract for keeping sheep at a stip-

\* *Cram vs. Dresser*, 2 Sandford S. C., 120.

† *Seymour vs. Davis*, 2 Sandf. S. C., 240.

‡ *Harger vs. Edmonds*, 4 Barb. S. C. R., 256.

§ *The Mayor of Albany vs. Trowbridge*, 5 Hill, 71; affirmed in *Error*, 7 Hill, 429. *Batterman vs. Pierce*, 3 Hill, 171. *Barber vs. Rose*, 5 Hill, 76. *Whitbeck vs. Skinner*, 7 Hill, 58. *Stearns vs. Marsh*, 4 Denio, 227. *McCullough vs. Cox*, 6 Barbour S. C. R., 386. *Eldridge vs. Mather*, 2 Comstock R., 157.

|| *Button vs. Turner*, 6 N. H. R., 497; *supra*, 212, *in notis*.

¶ *Crowninshield vs. Robinson*, 1 Mason, 98, (1816).

ulated price, the defendant offered to prove that the sheep were so negligently kept that many of them died. The court, however, refused to admit it, intimating that on a *quantum meruit* the rule might be different, but that on a specific contract the defendant must be left to his cross action.

But on the same circuit, in assumpsit for the price of goods, the defendant was allowed to prove that they were of a quality inferior to what they were represented to be at the sale.\*

The Supreme Court of the United States at one time laid down the restricted rule.† It was an action of assumpsit brought to recover the amount of a note given for a race-horse, and which the defendant offered to prove was unsound at the time of sale. The judge held that the evidence was inadmissible, unless the plaintiff at the time of the sale knew of the unsoundness, or in other words, was guilty of fraud. This doctrine was held correct, and the court said,

"The result of the cases is this: if upon a sale with a warranty, or if, by the special terms of the contract, the vendee is at liberty to return the article sold, an offer to return it is equivalent to an offer accepted by the vendor, and in that case, the contract is rescinded and at an end, which is a sufficient defense to an action brought by the vendor for the purchase money, or to enable the vendee to maintain an action for money had and received, in case the purchase money has been paid. The consequences are the same where the sale is absolute and the vendor afterwards consents unconditionally to take back the property; because in both the contract is rescinded by the agreement of the parties, and the vendee is well entitled to retain the purchase money in the one case, or to recover it back in the other. But if the sale be absolute, and there be no subsequent agreement or consent of the vendor to take back the article, the contract remains open, and the vendee is put to his action upon the warranty, unless it be proved that the vendor knew of the unsoundness of the article, and the vendee tendered a return of it within a reasonable time."

The whole subject has, however, recently been examined by the same high tribunal in a case coming up from Alabama, in which, although it was decided upon the local law of that State, the reasonableness of the American doctrine, "that upon the principles of justice and convenience and with a view to prevent litigation and expense, where fraud has occurred, or where there has been a failure of consideration, total or par-

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\* *Miller vs. Smith*, 1 Mason, 487.

† *Thornton vs. Wynn*, 12 Wheat., 188.

tial, or a breach of warranty, fraudulent or otherwise, all or any of these facts may be relied on in defense by a party when sued on such contract, and that he shall not be driven to a cross-action," was ably and elaborately maintained.\*

The more liberal rule has also been recently adopted in Massachusetts. So in an action† brought by a factor to recover against his principal, the plaintiff's negligence in selling the defendant's goods being set up by way of diminution of damages, the previous cases were reviewed, and the court said, "The question for a time may have ranked in the class of legal uncertainties; but it appears to us at present, to be settled on reasonable and satisfactory principles."‡

\* Withers *vs.* Greene, 9 Howard, 214; and same doctrine affirmed in Van Buren *vs.* Digges, 11 Howard, 461.

† Dodge *vs.* Tileston, 12 Pick., 828.

‡ And to this the courts of that State have adhered. In Harrington *vs.* Stratton, 22 Pick., 510, in an action on a promissory note given on an exchange of horses, the defendant offered to prove false representation made by the plaintiff in reduction of damages; and the Supreme Court of Massachusetts, after reviewing the English and American cases, particularly those in New York, at length distinctly disclaimed any distinction between a suit brought on the original contract, and on a security given for the price; and held that in either case the defendant might show a partial failure of consideration, to reduce the damages; but that notice would be necessary to let in the defense.

And again, in *assumpsit* on a promissory note for an ox, it was held by the same court, Perley *vs.* Balch, 23 Pick., 384, that the purchaser might avail himself of a partial failure of consideration, or of deception in the quality or value of the chattel, to reduce the damages, and was not obliged to resort to a separate action for the deceit, or upon the warranty. In a recent case in the same State, the subject has been again considered. In a suit on a note given for a chaise warranted to be a *first rate chaise*, the defendant offered evidence to show that there were defects in it, and contended that the difference between the amount agreed to be paid for the chaise and what the jury should deem its true value at the time of the sale, was the amount of deduction to which he was entitled. But the judge charged that if there were defects in the chaise at the time of the sale, the defendant was entitled to have so much deducted from the note as the chaise was worth less on account of such defects, and this was held right on exception, the court saying, "There was no question before the jury as to the actual worth of the chaise, no question whether either party had made a good or bad bargain." Goodwin *vs.* Morse, 9 Met., 278.

As to the defense of a judgment recovered in a former suit, where the same services have been credited, see Briggs *vs.* Richmond, 10 Pick., 891. In Hunt *vs.* The Otis Company, 4 Met., 464, where a plaintiff had entered into a manufactory with knowledge of a regulation adopted by the company, requiring all persons employed by them to give them four weeks' notice of an intention to quit their service, and quitted their service without giving such notice, he was held liable, in a suit brought against them for his wages, for all damages caused by his not giving the notice; and in such suit the amount of such damages may be deducted from his wages.

In Pennsylvania, damages arising from a breach of warranty of goods sold, may

In England, the rule adopted in this country has been but

be set-off under the statute of that State in an action on a note given in a *different transaction*. *Phillips vs. Lawrence*, 6 Watts & Serg., 150; *Carman vs. Franklin Fire Ins. Co.*, 6 Watts & Serg., 155. Where the plaintiff sold land to the defendant for \$3,000, and took bonds for the price to the amount of \$1,500, at the time of the sale, the land was incumbered by judgments to the amount of \$750. Under these judgments the land was sold, and the defendant bought it in for this sum. The plaintiff sued on the bonds, and the defendant set this up as a total failure of consideration. But it was held that the defendant could only set-off or deduct the amount paid by him on the incumbrances, and that the plaintiff was entitled to recover the balance. *McGinnis vs. Noble*, 7 Watts & Serg., 454.

In Connecticut the rule appears unsettled. In *McAlpin vs. Lee*, 12 Conn., 129, the Supreme Court of Connecticut recognized the doctrine of *Resc* vs. *McAlister*, and applied it to an action of book debt brought to recover the price of property sold under a special agreement, which proved inferior in quality to that contracted for, and allowed the defendant in the assessment of damages a deduction of the agreed price, and the value of the property sold, the court saying that the rule was the same whether the action was for goods sold and delivered, or upon a bill or note given for the stipulated price.

But in *Puleifer vs. Hotchkiss*, 12 Conn., 285, in an action on a note given for a patent, the same court held that the defendant could not show that the plaintiff had made false representations in regard to its value and that the consideration had partially failed, but that he must resort to his action on the warranty. In Delaware, see *Draper vs. Randolph*, 4 Har., 454.

In Alabama the Supreme Court has recently, in a very learned and elaborate opinion, adopted the doctrine of recoupment, by that name, and applied it to the case of a warehouseman who had advanced on cotton deposited with him. In an action brought for these advances, it was held competent for the owner of the cotton to recoup the damages sustained by the destruction of the cotton through the plaintiff's negligence. *Hatchett vs. Gibson*, 18 Ala. N. S., 587.

So, in the same State, if an overseer employed at a stipulated price per annum, is sick a part of the time and thus unfitted for active service, the employer may recoup the damages sustained by the imperfect performance of the contract. *Jones vs. Deyer*, 16 Ala., 221. *Hunter vs. Waldron*, 7 Ala., 752. See, also, *McLane vs. Miller*, 12 Ala., 648.

So in Maine, in an action on a note given for the good will of a business, a partial failure of consideration (growing out of the fact that the plaintiff had returned to practice), though unliquidated, may be given in evidence to mitigate the damages. *Herbert vs. Ford*, 29 Maine, 546.

In Tennessee the doctrine has been introduced to but a limited extent. It has been declared applicable only to cases where a special contract has been partially executed, but not according to its terms. Here the defendant is liable to the plaintiff, not on the special contract, but on an *indebitatus assumpsit*, for so much as the defendant may be found liable *ex aequo et bono*, to pay for the partially or defectively executed contract; and in such case, in order to ascertain what the defendant does, *ex aequo et bono*, really owe, he shall be allowed by way of recoupment such damages as he has sustained by reason of the non-performance of the contract, as it was entered into by the plaintiff, and which he could recover by a cross action. *Porter vs. Woods*, 8 Humphreys, 60. *Crouch vs. Miller*, 5 Humphreys, 586. But on an executed contract, as in debt or *indebitatus assumpsit*, for the price of a slave sold and delivered, the defendant cannot recoup the damages accruing by reason of a breach of warranty. *Henning vs. Van Hook*, 8 Humphreys, 678. So where an engineer sues for his stipulated salary, damages sustained by his employer by reason of his unskillful perform-



partially recognized.\* In an action of assumpsit for goods sold, brought to recover the price of some cinq foin seed, warranted by the plaintiff to be good, new growing seed, it was held competent for the defendant to show that it did not correspond with the warranty. The plea was the general issue without notice, but the defense went to the whole action. And in assumpsit† for a horse sold, the plaintiff having warranted him, it was held that the defendant had a right to give the breach of warranty in evidence, in reduction of damages. Again,‡ where the work was imperfectly done for an agreed sum, Vaughan, B., said, "I think the rule that there should be an abatement of price for the non-performance of any part of the contract by the plaintiff, is a convenient rule."

But, in other cases, the rule has not been adhered to.§ It has been held, indeed, that an attorney cannot recover against his client for work which was useless towards accomplishing the object which the client had in view.¶ But in a recent case,¶ the rule of *Templar vs. McLachlan*, above cited,\*\* was reaffirmed; and it was held that if the work was only partly useless, the client's remedy is by a cross action. It is worthy of remark, however, that in none of these cases is the term *recoupment* applied to a defense growing out of the defendant's counter claim. It is uniformly restricted in England, I believe, to

ance of his duties, cannot be set-off. *N. & K. Turnpike Co. vs. Harris*, 8 Humph., 558; and see, also, *Allen vs. McNew*, 8 Humphreys, 46.

In Mississippi, fraud in the sale of a slave may be proved in an action on the note given for the purchase money, under the plea of non-assumpsit. *Simmons vs. Cutreer*, 12 Smede & M., 584.

In Kentucky, also, it has been held that in an action brought on the contract for the price of goods sold, the defendant may give in evidence the breach of any warranty, or any fraudulent representation in the sale, and thus recoup the damages he has sustained. *Culver vs. Blake*, 6 B. Munroe, 523.

In Wisconsin it has been held by the Supreme Court, in accordance with the decisions in New York, that "matters in diminution of the plaintiffs demand, arising out of the same transaction and not technically an off-set," can be set off by way of recoupment, provided notice be given with the plea. *Norton vs. Rooker*, Wisconsin Reports, by T. P. Burnett, 1844, 83.

\* *Poulton vs. Lattimore*, 9 Barn. & Cres., 259, (1829).

† *Street vs. Blay*, 9 B. & Adol., 456, (1831).

‡ *Allen vs. Cameron*, 3 Tyr., 307. 1 Cr. & Mees., 833, (1833).

§ *Hill vs. Featherstonhaugh*, 7 Bing., 569.

¶ See, also, *Bracey vs. Carter*, 13 Adol. & Ellis, 373, where the same principle was recognized.

¶ *Shaw vs. Arden*, 9 Bing., 287.

\*\* *Supra*, 484.

that limitation of the plaintiff's demand which shows that he has really not suffered the loss which he alleges.

In a recent case in the English Exchequer,\* the whole subject was considered by that court. The suit was special assumpsit on a contract to build a ship for the plaintiff according to certain specifications, and the breach charged, that the work was insufficiently done, by reason of which the plaintiff had been obliged to re-fasten and repair her. The defendant pleaded a former suit brought by himself for the contract price, in which the now plaintiff gave evidence of the same breach of contract as that alleged in the present declaration, and averred that the jury deducted the compensation due the now plaintiff in that suit. The plea was held bad, substantially on the ground that in the former action the plaintiff could only have been allowed a deduction of damages from the agreed price so far as the ship fell short of the contract at the time of delivery, and not for subsequent repairs. Parke, B., said,

"The ground on which it was endeavored to support the plea, in a very ingenious argument, was this: That a defendant in an action for the stipulated price of a chattel, which the plaintiff had contracted to make for the defendant of a particular quality, or of a specific chattel sold with a warranty, and delivered, had the option of setting up a counter claim for breach of the contract in the one instance, or the warranty in the other, in the nature of a cross action; and that if he exercised that option, he was in the same situation as if he had brought such an action, and consequently could not after judgment in one action bring another; and the case was likened to a set-off under the statutes. This argument was founded on no other authority than an expression of Lord *Tenterden*, in giving the judgment of the court in the case of *Street vs. Blay*; his lordship having said that a breach of warranty might be given in evidence in an action for the price of a specific article sold, in mitigation of damages, 'on the principle, it should seem, of avoiding circuity of action.' But we are all of opinion that no such inference is to be drawn from that expression. What was meant was, that the sum to be recovered for the price of the article might be reduced by so much as the article was diminished in value by reason of the non-compliance with the warranty; and that this abatement was allowed in order to save the necessity of a cross action. Formerly, it was the practice where an action was brought for an agreed price of a specific chattel sold with a warranty, or of work which was to be performed according to contract, to allow the plaintiff to recover the stipulated sum, leaving the defendant to a cross action for breach of the warranty or contract; in which action, as well the difference between the price contracted for and the real value of the arti-

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\* *Mondel vs. Steel, 8 Mees. & Wels., 858.*

cles, or of the work done, as any consequential damage might have been recovered; and this course was simple and consistent. In the one case, the performance of the warranty not being a condition precedent to the payment of the price, the defendant, who received the chattels warranted, has thereby the property vested in him indefeasibly, and is incapable of returning it back; he has all that he stipulated for as the condition of paying the price, and therefore it was held that he ought to pay it, and seek his remedy on the plaintiff's contract of warranty. In the other case, the law appears to have construed the contract as not importing that the performance of every portion of the work should be a condition precedent to the payment of the stipulated price, otherwise the least deviation would have deprived the plaintiff of the whole price; and therefore the defendant was obliged to pay it, and recover for any breach of contract on the other side. But after the case of *Basten vs. Butler*, a different practice, which had been partially adopted before in the case of *King vs. Boston*, began to prevail, and being attended with much practical convenience, has been since generally followed; and the defendant is now permitted to show that the chattel by reason of the non-compliance with the warranty in the one case, and the work in consequence of the non-performance of the contract in the other, were diminished in value. (*Kist vs. Atkinson, Thornton vs. Place*), &c. The same practice has not, however, extended to all cases of work and labor, as for instance that of an attorney (*Templer vs. McLachlan*), unless no benefit whatever has been derived from it; nor in actions for freight (*Sheels vs. Davies*.) It is not so easy to reconcile these deviations from the ancient practice with principle, in those particular cases above mentioned, as it is in those where an executory contract, such as this, is made for a chattel to be manufactured in a particular manner, or goods to be delivered according to a sample (*Germaine vs. Burton*), where the party may refuse to receive, or may return in a reasonable time, if the article is not such as bargained for; for in these cases the acceptance, or non-return, affords evidence of a new contract on a *quantum valebat*; whereas, in a case of a delivery with a warranty of a specific chattel there is no power of returning, and consequently no ground to imply a new contract; and in some cases of work performed there is difficulty in finding a reason for such presumption: it must, however, be considered that in all these cases, of goods sold and delivered with a warranty, and work and labor, as well as the case of goods agreed to be supplied according to contract, the rule which has been found so convenient is established; and that it is competent for the defendant, in all of those, not to set off by a proceeding in the nature of a cross action, the amount of damages which he has sustained by breach of the contract, but simply to defend himself by showing how much less the subject-matter of the action was worth, by reason of the breach of contract; and to the extent that he obtains, or is capable of obtaining, an abatement of price on that account, he must be considered as having received satisfaction for the breach of contract, and is precluded from recovering in another action to that extent, but no more.

"The opinion, therefore, attributed on this record to the learned judge, is, we think, incorrect and not warranted by law; and all the plaintiff could by law be allowed in diminution of damages on the former trial, was a deduction

from the agreed price, according to the difference at the time of delivery between the ship as she was, and what she ought to have been according to the contract; but all claims for damages beyond that, on account of the subsequent necessity for more extensive repairs, could not have been allowed in the former action, and may now be recovered.”\*

A question analogous to those which we have been considering is presented in the case of conflicting claims for freight, and for damages resulting from bad stowage or other negligence of the carrier. In England the rule is, that the consignee who has received the goods must pay the freight without deduction, and resort to his cross action for the damage.† But the inclination of judicial opinion in this country seems to be to allow the injury done by the negligence of the carrier to be set off as an answer, *pro tanto*, to his claim for compensation. It has been so decided in Illinois and in Pennsylvania.‡ So, also, the consignee of property a part of which is not delivered, may recoup the damage so sustained in an action against him for the freight.§ The same principle has been applied to the case of an agreement to load a vessel with a stipulated freight, where the defendant failed to comply with his contract, but third persons offered to make up the deficiency. Here it was held that the master was bound to accept the offer of such third persons, and that the defendant was entitled to recoup the freight moneys that they would have paid.]

Nor is the doctrine of recoupment confined exclusively to cases of contract. It is often applied in cases of tort. So in trover.

Thus, it has been held applicable, in New York, to a lien for freight, where the goods were sued for in trover.¶

A question very analogous to this is, how far evidence

\* For other English cases, see *Leggett vs. Cooper*, 2 Stark., 98; *Kist vs. Atkinson*, 2 Camp., 68; *Okell vs. Smith*, 1 Stark., 107, (86); *White vs. Chapman*, ib., 118, (81); *Denew vs. Daverell*, 3 Camp., 451; *Sheels vs. Davies*, 4 Camp., 119; *Caswell vs. Coare*, 2 Taunt., 107; *Montriou vs. Jefferys*, 2 Car. & P., 118; *Hamond vs. Holiday*, 1 C. & P., 284; *Bamford vs. Harris*, 1 Stark., 274.

† *Davidson vs. Gwynne*, 12 East, 381. *Sheels vs. Davies*, 4 Camp., 119; and *S. C.*, 6 Taunt., 65. And see *Abbott on Shipping*, Part IV., Chap. IX., 428.

‡ *Edwards vs. Todd*, 1 Scammon, 468. *Leech vs. Baldwin*, 5 Watts, 446. *Humphrey vs. Reed*, 6 Wharton, 435.

§ *Hinsdale vs. Weed*, 5 Denio, 172.

] *Hecksher vs. McCrea*, 24 Wend., 304; *supra*, 361, and also, 430. And see, to same point, *Costigan vs. Mohawk & H. R. R.*, 2 Denio, 610.

¶ *Everett vs. Saltus*, 20 Wend., 267 and 273.

of payments when not pleaded, or when made after the commencement of the suit, is admissible in reduction of damages; and the more reasonable rule in the latter case would seem to be, that in such case proof of the payment is admissible to show that the plaintiff has not sustained the entire injury for which he claims compensation.\*

It is well settled, however, that after an action is brought and costs incurred, the defendant cannot bar the plaintiff's suit by paying the debt merely, without also paying the costs. And where such payment is made, the plaintiff will generally be entitled, if the costs are not paid, to take judgment for nominal damages and his costs.† But if the payment is made in satisfaction of the debt, damages, and costs, then the verdict will be for the defendant.‡ A plea of payment into court in full satisfaction of all the causes of action in the declaration contained is good, being an answer to the damages as well as the debt.§ But a plea of payment into court in debt, stating that the defendant never was indebted to the plaintiff to a greater amount than the sum paid into court, is bad, as not answering the damage for the detention of the debt.

I cannot here omit to say, that the doctrine of recoupment as generally adopted in the United States, appears to me settled on just and philosophical principles, while at the same time there is no doubt that it works a serious innovation in the ancient rules which seek to produce singleness of issues. Those rules are, however, so far modified by the practice of double pleading, set-off, and lastly of recoupment, that it becomes a grave question, whether they are now of any very considerable practical value; and it is at least quite doubtful whether the forms of action are of any great utility, so far as they are supposed, or were originally intended, to produce a single issue.

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\* *Shirley vs. Jacobs*, 2 Bing. N. C., 88. *Lediard vs. Boucher*, 7 Car. & Payne, 1. *Richardson vs. Robertson*, 1 Mees. & Wels., 468. Vide *supra*, 110.

† *Belknap vs. Godfrey*, 22 Verm., 289.

‡ *Thames vs. Boast*, 12 Q. B. R., 808.

§ *Triston vs. Barrington*, 16 M. & W., 60.

| *Lowe vs. Steele*, 15 M. & W., 280.

## CHAPTER XVIII.

### THE RULE OF DAMAGES IN ACTIONS FOR TORTS GENERALLY.

Forms of Action prescribed for wrongs—Trover—Case—Trespass—Replevin—Unless Aggravation is proved, the Measure of Damages in actions of Tort is matter of Law—Where Aggravation is shown, the Jury have a discretion to give Exemplary or Vindictive Damages beyond compensation for actual Loss—All the attendant circumstances may be proved—Rule where both plaintiff and defendant are in fault—In Collision—In Cases of Felony.

HAVING thus disposed of the subject of contracts, we proceed now to the consideration of wrongs. The forms prescribed by the English law for the redress of wrongs, or as they are technically termed, actions *ex delicto*, are trover, case, trespass, replevin, and detinue.\*

The divisions of our system in this respect are arbitrary; for, as we have already had occasion to notice,† there are many actions nominally in tort, which, in respect to the measure of relief, are treated as virtually actions *ex contractu*; and in these cases a fixed rule of damages is adhered to. So in an action of trespass without any circumstances of aggravation, the Supreme Court of the United States said that, the case not being one which called for vindictive or exemplary damages, the plaintiff was only entitled to recover for his actual injury.‡ So, there are many cases of tort where no question of fraud, malice, or oppression intervenes; and in those cases the measure

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\* The old action of detinue is of comparatively rare occurrence, and in New York is abolished by statute.

Grotius thus begins his chapter *De Damno*. *Supra diximus ejus quod nobis debetur fontes esse tres; pactionem—maleficium—legem. De pactionibus satis tractatum. Veniamus ad id quod ex maleficio naturaliter debetur. Lib. II., Cap. 17, § 1, De Jure Belli et Pacis.* (Grotius treats only of *Damnum*, under this head of *Maleficium*.—*De Jur. Bell. et Pac.*, Lib. II., Cap. 17; vide, also, *supra*, 21.

† *Supra*, 335 and 355.

‡ *Conard vs. The Pacific Ins. Co.*, 6 Peters, 262, 282. See, also, *Bell vs. Cunningham*, 3 Peters, 69; *Tracy vs. Swartwout*, 10 Peters, 80, 95.

of compensation is matter of law. So the Supreme Court of New Jersey says, in an action of *trespass quare clausum fregit*, "In actions of trespass, where the plaintiff complains of no injury to his person or feelings; where no malice is shown; where no right is involved beyond a mere question of property; where there is a clear standard for the measure of damages, and no difficulty in applying it,—the measure of damages is a question of law, and is necessarily under the control of the court.\* And so again in North Carolina, in an action of trespass for destroying a building by fire, the jury at nisi prius were directed that the measure of damage was not the value of the building, but the amount it would have taken to rebuild it if destroyed. But this, on review, was held wrong; and the court said, "the proper measure in actions of this kind is the real value of the property destroyed, unless the trespass is committed wantonly or maliciously, when the jury may, if they think proper, give vindictive damages. But whether they should have been given or not was a question which ought to have been submitted with proper instructions to the jury."† But, on the other hand, where circumstances of aggravation are made apparent, where the motive of the plaintiff is grossly fraudulent, malicious, or oppressive, the amount of relief is left largely to the discretion of the jury.

In regard to these latter cases, we have already observed the general disregard of the principle of compensation by which they are marked.‡ And I have stated the rule to be, that where gross fraud, malice, or oppression appears, the jury are not bound to adhere to the strict line of compensation, but may, by a severer verdict, at once impose a punishment on the defendant and hold up an example to the community. I proceed now to a review of the cases in which this salutary doctrine has been maintained.

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\* *Berry vs. Vreeland*, 1 Zabrickie's N. J. R., 188.

† *Wylie vs. Smitherman*, 8 Iredell, 286.

‡ *Supra*, 88. In addition to the cases cited in the text, others will be found bearing on the subject. *Leland vs. Stone*, 10 Mass., 459; *Weld vs. Bartlett*, 10 Mass., 470, 478; *Stone vs. Codman*, 15 Pick., 297; *Larned vs. Buffington*, 8 Mass., 546; *Richards vs. Farnham*, 18 Pick., 451. And the doctrine of our law is supported by writers of more than mere judicial authority. Thus says Mr. Rutherford: "Indeed, in many instances of gross fault, it is so difficult to distinguish between a mere neglect and a malicious design, that besides the demand of reparation for damages done, some punishment may reasonably be inflicted upon the person so offending."—*Rutherford's Institutes of National Law*, book i., ch. 17, *Reparation*, 209.

That the intent of the defendant is material in regard to damages, has always been recognized in our law: "damages are graduated by the intent of the party committing the wrong."\* Indeed, the rule is, that if the rights of another party are invaded, although without evil design, and even if the act be purely accidental, the trespass must be answered for in damages. The question of intention is only urged in mitigation or aggravation of damages. Thus in an early decision, a case of trespass *quare clausum fregit* is cited, where the defendant pleaded "he had an acre lying next the six acres (*locus in quo*), and on it a hedge of thorns: he cut the thorns, and they, *ipso invito*, fell upon the plaintiff's land; and the defendant took them off as soon as he could, which is the same trespass; and the plaintiff demurred, and it was adjudged for the plaintiff; for though a man do a lawful thing, yet if any damage do hereby befall another, he shall answer for it if he could have avoided it. As, if a man fell a tree, and the boughs fall on another, *ipso invito*, yet the action lies. If a man shoot at butts and hurt another unawares, an action lies. I have land through which a river runs to turn your mill, and I top the willows growing on the river-side, which accidentally stop the water so as your mill is hindered, an action lies. If I am building my own house, and a piece of timber fall on my neighbor's house and breaks part of it, an action lies."† So in a recent case in the Common Pleas, when in an affray the plaintiff was struck by accident, Bosanquet, J., said to the jury, "The plaintiff is entitled to your verdict whether it was done intentionally or not. But the intention is material in considering the amount of damages."‡ So, also, in New York, in an action against a company for blasting negligently done by their agents.§ The principle that in trespass the intent is not conclusive, is carried so far that a lunatic is held liable for his tortious acts, as an insane justice in an action for false imprisonment.¶ On principle this should never have been permitted. In the case of the *compos mentis*, although

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\* Krom *vs.* Schoonmaker, 8 Barb. S. C. R., 651.

† Lambert *vs.* Bessie, Sir T. Raym, 421.

‡ James *vs.* Campbell, 5 Car. & Payne, 372.

§ Hay *vs.* Cohoes Co., 8 Barb. S. C. R., 42.

¶ Krom *vs.* Schoonmaker, 8 Barb. S. C. R., 647. Morse *vs.* Crawford, 17 Verm., 499. Bush *vs.* Pettibone, 4 Comstock, 300.



the intent be not decisive, still, the act punished is that of a party competent to foresee and guard against the consequences of his conduct; and inevitable accident has always been held an excuse. In the case of the lunatic it may be urged, both that no good policy requires the interposition of the law, and that the act belongs to the class of cases which may well be termed inevitable accidents.

It might be said, however, that the malicious or insolent intention does in fact increase the injury, and the doctrine of exemplary damages might thus be reconciled with the strict notion of compensation; but it will appear from the cases we now proceed to examine, that the idea of compensation is abandoned and that of punishment introduced. So in an action of trespass, assault, and imprisonment, the act complained of being an arrest of the plaintiff as printer of the *North Briton*, under a general warrant issued by Lord Halifax, then Secretary of State—no actual ill-treatment being alleged, the jury having found a verdict for £300, on a motion for a new trial on the ground of excessive damages, Lord Chief Justice Pratt, afterwards Lord Camden, said,

“I cannot say what damages I should have given if I had been upon the jury; but I directed and told them they were not bound to any certain damages, against the solicitor general’s argument. The personal injury done to the plaintiff was very small; so that if the jury had been confined by their oath to consider the mere personal injury only, perhaps 20*l.* damages would have been thought damages sufficient; but the small injury done to the plaintiff, or the inconsiderableness of his rank and station in life, did not appear to the jury in that striking light in which the great point of law touching the liberty of the subject, appeared to them at the trial; they saw a magistrate over all the king’s subjects, exercising arbitrary power, violating *Magna Charta*, and attempting to destroy the liberty of the kingdom, by insisting upon the legality of this general warrant before them; they heard the king’s counsel, and saw the solicitor of the treasury, endeavoring to support and maintain the legality of the warrant in a tyrannical and severe manner; these are the ideas which struck the jury on the trial; and I think they have done right in giving exemplary damages.”\*

And the motion for a new trial was denied.†

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\* *Huckle vs. Money*, 2 Wils., 205.

† *Beardmore vs. Carrington*, 2 Wils., 244, was an action also growing out of these general warrants, where a verdict was found for the plaintiff in £1,000. As he had been

So, in an action of trespass, for debauching the plaintiff's daughter, a verdict having been found for 50*l.*, on a motion for a new trial on the ground that the damages were excessive Wilmot, Lord Chief Justice, said: "Actions of this sort are brought for example's sake; and although the plaintiff's loss in this case may not really amount to the value of twenty shillings, yet the jury have done right in giving liberal damages."\*

In an action in the English Common Pleas, of trespass *quare clausum fregit*, it appeared that the plaintiff, a gentleman of fortune, was shooting on his own estate, when the defendant, a banker, magistrate, and member of parliament, forced himself on the plaintiff's land, fired at game several times, and used very intemperate language. The jury found a verdict for £500; and on a motion to set it aside for excess, Gibbs, C. J., said,

"I wish to know, in a case where a man disregards every principle which actuates the conduct of gentlemen, what is to restrain him except damages. To be sure, one can hardly conceive worse conduct than this. What would be said to a person in a low situation of life, who should behave himself in this manner? I do not know upon what principle we can grant a rule in this case, unless we were to lay it down that the jury are not justified in giving more than the absolute pecuniary damage that the plaintiff may sustain. Suppose a gentleman has a paved walk in his paddock, before his window, and that a man intrudes, and walks up and down before the window of his house, and looks in while the owner is at dinner, is the trespasser to be permitted to say, 'here is a half-penny for you, which is the full extent of all the mischief I have done'? Would that be a compensation? I cannot say that it would be." And Heath, J., said, "I remember a case where the jury gave £500 damages for merely knocking a man's hat off; and the court refused a new trial. There was not one country gentleman in a hundred who would have behaved with the laudable and dignified coolness which this plaintiff did. It goes to prevent the practice of dueling, if juries are permitted to punish insult by exemplary damages."†

In a case in the King's Bench, which was trespass for break-

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imprisoned but six days, a motion was made for a new trial, on the ground of the excessiveness of the damages. But it was refused. Lord Campbell, in his *Lives of the Chancellors*, Vol. 5, 249, reports Lord Chief Justice Pratt to have said, "As to the damages, I continue of opinion that the jury are not limited to the injury received. Damages are designed not only as a satisfaction to the injured person, but likewise as a punishment to the guilty, and as a proof of the detestation in which the wrongful act is held by the jury." But I cannot find this language in the case as reported by Wilson.

\* *Tullidge vs. Wade*, 3 Wils., 18.

† *Merest vs. Harvey*, 5 Taunt., 442.

ing the plaintiff's close, and laying poison upon it to destroy the plaintiff's poultry, the defendant contended that he was only liable for the value of the fowls destroyed ; but Abbott, J., told the jury that they might consider not only the mere pecuniary damage, but also the intention, whether for insult or injury ; and the verdict was £50.\*

So, in a recent case,† the Court of Exchequer said : " In actions for malicious injuries, juries have been allowed to give what are called vindictive damages, and to take all the circumstances into consideration."

So in the Exchequer Chamber, Lord Denman recently said that the actions of trespass to real and personal property were an extension of that protection which the law throws around the person, and that substantial damages may be recovered in respect of such rights though no loss or diminution in value of property may have occurred.‡

In the United States generally, the power of the jury to give exemplary damages where circumstances of aggravation render it impossible to apply any fixed rule of law, has been steadily maintained.

So on the Pennsylvania circuit, " I admit," said Washington, J.,§ " that in cases where merely vindictive damages are sued for, the jury act without control on the subject of damages; because there is no legal rule by which they can be measured, and unless they are so extravagant as to induce a suspicion of improper conduct, the court will not interfere."

The rule is well settled in New York. So in an action for libel, it was urged on a motion for a new trial, that the public character of the plaintiff as an officer of government, and the evil example of libels, were stated by the judge to the jury, as considerations with them for increasing the damages; but Kent, C. J., delivering the opinion of the Supreme Court, said, " Surely this is the true and salutary doctrine. The actual pecuniary damages in actions for defamation, as well as in other actions for tort, can rarely be computed, and are never the sole

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\* *Sears vs. Lyons*, 2 Stark., 282.

† *Doe vs. Filliter*, 18 Mees. & Wels., 47.

‡ *Rogers vs. Spence*, 18 M. & Wels., 571. See, also, *Williams vs. Cruise*, 1 Man. & Sc., 841.

§ *Walker vs. Smith*, 1 Wash. C. C. R., 152.

rule of assessment." And after reviewing the English cases, the court proceeded: "but it cannot be requisite to multiply instances in which the doctrine contained in this part of the charge has received the sanction of English and American courts of justice. It is too well settled in practice, and is too valuable in principle, to be called in question."\* Spencer, J., held still stronger language, "In vindictive actions," he said, "such as for libels, defamation, assault and battery, false imprisonment, and a variety of others, it is always given in charge to the jury, that they are to inflict damages for example's sake, and by way of punishing the defendant."

So again, in another case,† where trespass was brought for beating a horse to death, the judge charged, that if they found for the plaintiff, it was a case in which, from the wantonness and cruelty of the defendant's conduct, the jury had a right to give smart money. A verdict was found for \$75. A motion was made to set aside the verdict for misdirection, and for excessive damages; but the Supreme Court of New York said, "great barbarity was proved on the part of the plaintiff; we think the charge of the judge was correct, and should have been better satisfied with the verdict if the amount of damages had been greater and more exemplary;" and the motion was denied.

The same principle was recognized on the Massachusetts circuit, by Mr. Justice Story,‡ who said, "In cases of marine torts, or illegal captures, it is far from being uncommon in the Admiralty to allow costs and expenses, and to *mult* the offending parties, even in exemplary damages, when the nature of the case requires it. Courts of Admiralty allow such claims, not technically as costs, but on the same principle as damages are often allowed in cases of torts by courts of common law, as a recompense for injuries sustained, *as exemplary damages*, or as a remuneration for expenses incurred, or losses sustained, by the misconduct of the other party."

So, again, the same learned Judge, on the Maine Circuit, in an action for malicious prosecution used this language: "If in the present case there was on the part of the defendant a want of probable cause; yet if he acted under a mistaken sense

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\* Tillotson vs. Cheestham, 8 J. R., 56 and 64.

† Woert vs. Jenkins, 14 J. R., 852.

‡ Boston Manuf. Co. vs. Fiske, 2 Mason, R., 120.

of duty and without any intention of oppression, it was at most a case for *compensatory* and not for *vindictive* damages.”\*

So in New Hampshire, in an action on the case to recover damages, resulting from defects of a bridge which the defendants were bound to repair, the jury were instructed that exemplary damages might be allowed in their discretion, in case they believed there had been gross negligence on the part of the defendants; and on a motion for a new trial for misdirection, the Superior Court reviewed the English and American cases, and closed by saying, “The principle being thus established, that in actions for torts to the person and to personal property, the jury may give liberal or exemplary damages in their discretion, damages beyond the actual injury sustained, for the sake of the example, the only remaining inquiry is whether the present case was proper for the exercise of that discretion.” And it was held to be so.†

So in Connecticut, in an action on the case for gross negligence, it was said by Church, J., in delivering the opinion of the Supreme Court of Errors: “There is no principle better established and in practice more universal, than that *vindictive damages or smart money* may be and is awarded by the verdict of juries, and whether the form of action be trespass or case.”‡

So in Pennsylvania, Gibson, J., delivering the opinion of the court, said: “In cases of personal injury, damages are given not to compensate but to punish.”§

And the doctrine has been fully adopted by the Supreme Court of the United States. In an action of trover,|| brought for goods illegally seized by the collector of New York under instructions from the secretary of the navy, his immediate superior, the circuit judge charged that the collector having acted in good faith should not be subjected to the payment of more than nominal damages. But the Supreme Court said, “Where a ministerial officer acts in good faith, for an injury done he is not liable to exemplary damages; but he can claim

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\* *Wiggin vs. Coffin*, 3 Story, 1.

† *Whipple vs. Walpole*, 10 N. H. R., 180.

‡ *Linsley vs. Bushnell*, 15 Conn., 225; and *Huntley vs. Bacon*, 15 Conn., 267.

§ *Pastorius vs. Fisher*, 1 Rawle, 27; but it is to be noticed that the remark is obiter.

|| *Tracy vs. Swartwout*, 10 Peters, 81.

no further exemption where his acts are clearly against law. The good faith with which the defendant seems to have acted, should not exempt him from *compensatory* damage."

So in a case of marine trespass, brought against the owners of a privateer for an illegal seizure, the Supreme Court of the United States said, "This is a case of gross and wanton outrage. The honor of the country and the duty of the court equally require that a just compensation should be made to unoffending neutrals, for all the injuries and losses actually sustained by them. And if this were a suit against the original wrongdoer, it might be proper to go yet farther, and visit upon them, in the shape of exemplary damages, the proper punishment which belongs to such lawless misconduct. But it is to be considered that this is a suit against the owners of the privateer; they are innocent of the demerit of the transaction. Under such circumstances, we are of opinion they are bound to repair all the real injuries and personal wrongs sustained by the libelants, but they are not bound to the extent of vindictive damages."\*

So in Connecticut, it has been said, that in actions for injuries to personal property, "the jury are not restricted to the pecuniary loss of the plaintiff."†

So in Pennsylvania—"that with a view to promote the peace and quiet of society, and to protect every one in the full enjoyment of his rights, the jury are at liberty to give vindictive or exemplary damages."‡

In Alabama it has been recently said, in reference to the action for malicious prosecution, that "the common law in such cases allows the jury, if they choose, to make an example of the defendant when sued for redress, and will allow them to go beyond the actual damage the party has sustained."§

So in Louisiana, that damages are to be measured by the extent of injury, except where the defendant has been guilty of gross misconduct, and then vindictive damages may be sometimes given by a jury.]

In New York the general rule has been repeatedly de-

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\* Story, J., in the *Amiable Nancy*, 8 Wheaton, 546.

† *Merrills vs. Tariff Man'g Co.*, 10 Conn., 884.

‡ *Phillips vs. Lawrence*, 6 Watts & Serg., 150.

§ *Donnell vs. Jones*, 18 Ala. N. S., 490, 502.

| *Nelson vs. Morgan*, 2 Martin L. R., 257.

clared. So, in an action for libel, it was said by the Chancellor in the Court of Errors, "The jury may not only give such damages as they think necessary to compensate the plaintiff for his actual injury, but they may also give damages by way of punishment to the defendants. This is usually denominated exemplary damages, or smart money."\*

The subject has been again recently examined in the same State, and the general principle very clearly stated. It was an action for assault and battery, where it was insisted that the fact that the defendant had been punished criminally for the offense should be received in evidence to mitigate damages in the civil suit. The court held otherwise, saying—

"In vindictive actions, and this is agreed to come within that class, jurors are always authorized to give exemplary damages when the injury is attended with circumstances of aggravation, and the rule is laid down without the qualification that we are to regard either the probable or the actual punishment of the defendant by indictment and conviction at the suit of the people. \* \* \* We concede that smart money allowed by a jury, and fines imposed at the suit of the people, depend on the same principle. Both are penal, and intended to deter others from the commission of the like crime. The former, however, becomes incidentally compensatory for damages, and at the same time answers the purposes of punishment."†

In a still more recent case, in the Court of Errors of the same State, Mr. Senator Strong said, "In aggravated cases of this nature are not jurors daily charged, to give such damages as shall not only remunerate the plaintiff, but operate as a punishment to the defendant—as shall deter him and others in like case offending, from the perpetration of similar enormities?"‡

A very full discussion has been recently had of the subject

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\* *King vs. Root*, 4 Wend., 118, 139.

† *Cook vs. Ellis*, 6 Hill, 465. See, also, *Tift vs. Culver*, 3 Hill, 180. *Auchmuty vs. Ham*, 1 Denio, 495, and *Brizae vs. Maybee*, 21 Wend., 144, where it is suggested that the jury may give smart money in replevin.

In England, however, it has been held that a party not suffering any actual injury, who has preferred an indictment, and succeeded, and received from the treasury a portion of the fine imposed on the defendant, is not entitled in an action against the same defendant to recover more than nominal damages. *Jacks vs. Bell*, 3 Car. & Payne, 816.

‡ *Burr vs. Burr*, 7 Hill, 207, 217; and see the rule very strongly laid down in cases of slander of title, in *Kendall vs. Stone*, 2 Sandf. S. C., 269.

in Pennsylvania, when the following language was held, and the doctrine well maintained on principle :

"In trespass, the *quo animo* is certainly not material to the question of liability; nor is it so even to the quantum of damages, in order to bring it below the actual injury. The common law rejects the compromising principle of the civil law, which divides the loss betwixt parties equally blameless; and acts on a sterner, but more exact rule of justice, by casting the whole on him who occasioned it, and requiring him to bear the consequences of his own acts and his own mischances. But though mitigant circumstances may not reduce the compensation below actual loss, may not circumstances of aggravation be suffered to enhance it? Whatever be the speculative notions of fanciful writers, the authorities teach that damages may be given in peculiar cases, not only to compensate, but to punish. There are offenses against morals, to which the law has annexed no penalty as public wrongs, and which would pass without reprehension, did not the providence of the courts permit the private remedy to become an instrument of public correction. Such, in a signal degree, is the function of an action for debauching a daughter, in which the consequential loss of service—the legal and technical injury—is compensated a thousand fold, though its value is as capable of accurate estimation as that of any other commodity. It is idle to say that loss of service is not the real gravamen. The law tolerates no anomaly so monstrous as a count for one cause of action, and a recovery for another. Were damages given not to castigate, but to remunerate for loss of prospects, comfort, and honor,—if haply there could be an equivalent for these,—the count and the evidence would conform to the grievance; instead of which, it is indispensable to assert the evidence of servitude, and to prove it. As regards the plaintiff, then, the ostensible wrong is the real one; but as regards the public, it may be a very different thing. On no other principle could more be given than is commensurate with what the law admits to be an injury. On what other principle are the circumstances of the defendant put before the jury for the purposes of aggravation or mitigation, in perhaps all cases of personal tort? The ability of the plaintiff legitimately enters into the estimate of compensatory damages, because a dollar is worth less to a rich man than to a poor one; but the extent of an injury has no imaginable relation to the means of him who is to repair it. In actions whose end is clearly compensation, and no more—trover and debt for example—the law inquires not into the ability of him who has converted my chattels, or withheld my money, but gives me the same damages or interest, whether he be rich or whether he be poor, or whether the wrong were more or less excusable in a moral view; and the converse shows that where the defendant's circumstances are brought into the account, something else than individual reparation is contemplated. Nor can it be said that the wrongdoer is to suffer in order to appease the resentment of the injured, and that even vindictory damages are in truth compensatory. The purposes of the law are more elevated than the gratification of revenge. Mental or bodily pain is doubtless a legitimate subject of amends, produced, however, not by the infliction of suf-



fering, but by a pecuniary equivalent. The enhancement of damages, by the ability of the defendant, not being designed for the benefit of the plaintiff, must consequently be for something beyond compensation. That corrective damages may be given for the sake of example, is *as old as the law itself*.\*

But in an amicable action it is error to tell the jury they were not confined to the actual damage.† So in New York, in actions for the loss of service (not being for seduction), the father cannot recover more than actual damages, as the child may maintain his own suit.‡

In an exceedingly well reasoned case on the Pennsylvania Circuit, Mr. Justice Grier said—

“It is a well settled doctrine of the common law, though somewhat disputed of late, that a jury, in actions of trespass or tort, may inflict exemplary or vindictive damages upon a defendant, having in view the enormity of the defendant's conduct rather than compensation to the plaintiff. Indeed, in many actions, such as slander, libel, seduction, &c., there is no measure of damages by which they can be given as compensation for an injury, but are inflicted wholly with a view to punish and make an example of the defendant.”§

So, also, it has been said in Illinois, “In vindictive actions the jury are always permitted to give damages, for the double purpose of setting an example and punishing the wrongdoer.”|| So, again, in an action of trespass for assault and battery, it was said, “In this class of cases the jury may give exemplary damages, not only to compensate the plaintiff, but to punish the defendant.”¶ And in Texas the principle has been very recently recognized.\*\*

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\* *McBride vs. McLaughlin*, 5 Watts' R., 375. In Kentucky, see *Morrison's Ex'r vs. Hart*, 2 Bibb, 4, and *Smith vs. Lush*, 4 Bibb, 502. On the Massachusetts circuit, see *Whittemore vs. Cutter*, 1 Gall., 478, 482. In *Conard vs. Pacific Ins. Co.*, 6 Peters, 262, 282, see a very strong charge at the circuit. Where, however, two persons are jointly sued for an assault or other trespass, only one of whom has acted from improper motives, the damages ought not to be assessed with reference to the act and motives of the most guilty or the most innocent party, but the true criterion of damage is the whole injury which the plaintiff has sustained from the joint act of trespass. *Clark vs. Newsam*, 1 Exch. R., 181.

† *Amer vs. Longstreth*, 10 Barr, 145.

‡ *Whitney vs. Hitchcock*, 4 Denio, 468.

§ *Stimpson vs. The Railroads*, Wallace, Jr., R., 164.

|| *Grabe vs. Margrave*, 3 Scammon, 878. See, also, *Johnson vs. Weedman*, 4 Scammon, 495.

¶ *McNamara vs. King*, 3 Gilman, 432, 436.

\*\* *Smith vs. Sherwood*, 2 Texas R., 460.

So, also, recently in the State of Alabama, in an action of trespass *quare clausum fregit*.<sup>\*</sup> In a case of deceit, in South Carolina, the court said that the jury were at liberty to compensate the plaintiff, and punish a palpable fraud.<sup>†</sup> And in another case in the same State, where a trespass having been committed, the actual damage was very trifling, not exceeding, as was admitted, twenty dollars, and the jury gave three thousand dollars; the court said that if it had rested with them, they should not have given more than five hundred, but they refused to disturb the verdict.<sup>‡</sup>

In North Carolina the principle of vindictive damages has been distinctly declared, but has been held not to apply to suits against the representatives of a deceased party who had committed the act complained of.<sup>§</sup>

In many cases of slander and libel, indeed, the law even steps beyond the line here drawn, and requires no proof of actual injury whatever, to entitle the plaintiff to such amount as the jury see fit to give;| the only restriction in all these cases being the power exercised by the courts over corrupt, partial, and passionate verdicts.<sup>¶</sup>

<sup>\*</sup> Mitchell *vs.* Billingsley, 17 Ala., 391, Jan'y, 1850. Ivey *vs.* McQueen, 17 Ala., 408.

<sup>†</sup> Spikes *vs.* English, 4 Strobbart, 34.

<sup>‡</sup> Johnson *vs.* Hannahan, 8 Strobbart, 425.

<sup>§</sup> Rippey *vs.* Miller, 11 Iredell, 247.

<sup>|</sup> Starkie on Slander, Prol. Dis., 26.

<sup>¶</sup> I am not aware that the Roman law knew any thing of exemplary or vindictive verdicts, but perhaps the heaviest claim for damages on record is that urged by Cicero against Verres, for his abuse of power in Sicily. He first rates it at *millies*, £800,000, (*Dis. in Cæcil*, c. 5); then at *quadringenties*, £320,000, (*1 Act. in Verr.*, c. 18); and was finally content with *trices*, (£24,000). "After a triennial indulgence of lust, rapine, and cruelty," says the "luminous" historian, "Verres, the tyrant of Sicily, could only be sued for the pecuniary restitution of three hundred thousand pounds sterling. And such was the temper of the laws, the judges, and perhaps the accuser himself, that on refunding the thirteenth part of his plunder, Verres could retire to an easy and luxurious exile." Gibbon is not to be forgiven for perpetuating this gossiping slander of Plutarch against the integrity of Cicero. Gibbon, *Hist.*, Ch. 44.

In Scotland, the principle of compensation seems rigidly adhered to, even in cases of flagrant wrong. So in an action of damages for defamation, sending a challenge, assault, and threatened battery, the Lord Chief Commissioner, Adam, one of the most eminent judges of the present century, said, "In all cases of damage, a fair, unprejudiced discussion (*avoiding in civil cases the converting compensation for a civil injury into a matter of punishment*), will lead to a rational, conscientious, and fair compromise of your different opinions, and bring you to fix on one sum;" and the reporter adds, "in all cases of this sort his lordship has been in the habit of repeating this doctrine." Hyalop *vs.* Staig, 1 Murr. B., 15.

Again, in an action for defamation, the Lord Chief Commissioner said: "The

The necessary result of this rule is, that all the attendant circumstances of aggravation which go to characterize the

question of damages, in case of an attack on a professional man, must always include both a question of loss and *solatium*. You must consider it as a question of reparation, not of punishment; but if a person of perfectly pure character is assailed in this manner, you will consider whether a rich man ought not to pay a little more." *Christian vs. Lord Kennedy*, 1 Murr. R., 428.

The same rule was laid down by the same judge in actions of crim. con.

In *Baillie vs. Bryson*, 1 Murr. R., 817 and 887, an action of this class, the Lord Chief Commissioner said: "I cannot help thinking that Lord Kenyon introduced into cases of this sort a principle, as to damages, extremely dangerous in its consequences. He considered such questions not merely as calculated to repair the injury done to the one party, but as a punishment of the other, and as intended to correct the morals of the country. The morals of the country have not been improved, and I am afraid its feeling has been much impaired. A civil court, in matters of civil injury, is a bad corrector of morals; it has only to do with the rights of parties."

I apprehend, also, that this doctrine of vindictive or exemplary damages has been somewhat shaken in the State of Massachusetts, though I find no express decision to the effect. In *Barnard vs. Poor*, 21 Pick. R., 878, an action on the case was brought for setting a fire on defendant's own land, whereby plaintiff's wood was consumed. And it was held, that it was immaterial whether the plaintiff proved gross negligence or only want of ordinary care, inasmuch as he could only recover for the actual loss, and no more, whether claimed as vindictive damages or otherwise. If the negligence were so gross as to raise a presumption of malice, then, according to the law of the authorities in the text, I suppose it would be a case for exemplary or vindictive damages. But whether the principle of absolute compensation has been adopted or not by the courts of Massachusetts, it is certain that it has been systematically advanced by two very distinguished writers in that State. Mr. Metcalf, the reporter, in an able and ingenious article, 8d Amer. Jur., 387 and 818, first, I believe, advanced the theory that the Anglo-American law does not admit of any other than compensatory damages, or in his own words, "that the defendant ought not to pay more than the plaintiff is entitled to receive." And Mr. Greenleaf, in his recent work on Evidence, has adopted this view to its fullest extent. Whatever may be the true principle of the matter, it seems to me not difficult to show that the theory of compensation is not the theory of our law.

Mr. Greenleaf says, Vol. II., 209, "that the damages should be precisely commensurate with the injury, neither more nor less." This language certainly is in direct conflict with the whole system of damages in cases of contract, and I apprehend that the denial of the right to vindictive damages is equally untenable. In addition to the authorities which I have cited in the text, how is this position to be reconciled with the uniform language of the courts, on motions for new trials in hard actions, that they will not interfere unless the verdict be evidently the result of corruption, prejudice, or passion? The bench has uniformly refused to limit the damages to their own idea of compensation. There is a cloud of cases going to show conclusively, that although the court are entirely satisfied that the damages are excessive, and altogether beyond a compensation for the actual loss sustained, they will not, on motion for a new trial, interfere with the finding, unless the verdict is so extravagant as to bear evident marks of prejudice, passion, or corruption. *Sharpe vs. Brice*, 2 W. Black., 942. *Benson vs. Frederick*, 3 Burr., 184. *Duberley vs. Gunning*, 4 T. R., 651. *Sargent vs. Deniston*, 5 Cow. R., 106. *Graham on New Trials*, 410, et seq. *Buller's N. P.*, 327.

In *Thurston vs. Martin*, 5 Mason, 497, on the Rhode Island circuit, where a motion was made for a new trial on the ground of excessive damages, Story, J., said: "The damages are certainly higher than what, had I sitten on the jury, I should have

wrong complained of, may be given in evidence; and so it has been held both in England and in this country.\* Indeed, it may be said that in cases of tort, where no fixed and uniform rule of damages can be declared, the functions of the court at the trial of the cause are mainly limited to the reception and exclusion of evidence when offered either by way of aggravation or of mitigation, and to a definition of the line between direct and consequential damage.

We have already† had occasion to advert to the principle, that the party seeking legal redress must not only show his adver-

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been disposed to give, and I should now be better satisfied if the amount had been less;" but on the ground that "nothing appeared inconsistent with an honest exercise of judgment," the motion was denied. See, also, *Wiggin vs. Coffin*, 8 Story Rep., 1; and *Fisher vs. Patterson*, 14 Ohio, 418.

Again, Mr. Greenleaf admits, 224, "That where an evil intent has manifested itself in *acts and circumstances* accompanying the principal transaction, they constitute part of the injury;" and, 221, "that the defendant's wealth may be given in evidence." To admit testimony of this kind, to deny the power of the court to adjust the verdict according to the principle of compensation, and still to insist that the jury are bound to give a verdict strictly commensurate with the injury, seem to me practically incompatible and inconsistent propositions.

Nor, I confess, do I understand the wisdom of the proposed rule; in cases of tort, the suit at law appears to have public as well as private ends in view; I can see no reason why the defendant should not, in a civil suit, be punished for his act of fraud, malice, or oppression, nor why the pecuniary mulct which constitutes that punishment, should not go into the pockets of the plaintiff, instead of the coffers of the State. A strong analogy will be found in *qui-tam* actions. Any attempt to limit the inquiry of the jury, in cases of this description, to a strict measure of compensation, will be, I think, to institute an investigation of a character distressingly metaphysical, and utterly impracticable. In the Appendix to this volume will be found two articles discussing this question, which the interest and importance of the subject induce me to place there.

Mr. Chancellor Kent, in his Commentaries, Part 4, Sec. XXIV., Vol. I., 618, 7th edit., 1851, thus reviews and decides this controversy: "In the Law Reporter, April, 1847, there is an elaborate review of the cases in matters of tort, on the subject of exemplary damages, endeavoring to show that the decisions do not, on a strict examination and construction of the language of them, amount to authorities for going beyond compensatory damages. On this subject it appears to me that the conclusions in Mr. Sedgwick's Treatise are well warranted by the decisions, and that the attempt to exclude all consideration of the malice and wickedness, and wantonness of the tort in estimating a proper compensation to the victim, is impracticable, visionary, and repugnant to fine feelings of social sympathy."

I take pleasure in recording the approbation of an eminent man, whom it is a happiness to have known; whose life was one of uninterrupted and useful activity; and whose old age presented one of those beautiful pictures that we are sometimes permitted to behold—as satisfied in its retrospect as the imperfections of humanity allow; as hopeful of the future as an unwavering confidence in a higher power, and a consciousness of faculties neither wasted nor abused, may warrant.

\* *Bracegirdle vs. Orford*, 4 Maul. & Sel., 77. *Bateman vs. Goodyear*, 12 Conn., 875. *Smith vs. Lush*, 4 Bibb., 502.

† *Supra*, 98, 148.

sary to be in the wrong, but must also be prepared to prove that no negligence of his own has tended to increase or consummate the injury. "A party in an action on the case for negligence, cannot recover damages which have resulted from his own negligence and want of care. He must show himself in the right and the defendant in the wrong, that he has performed his duties, and that the defendant has neglected his, and that the damages are the legitimate consequence of the negligence of the defendant.\*

So in Massachusetts, an action for an injury received from a collision of carriages passing on a public road, cannot be maintained by a plaintiff who, at the time of the collision, was guilty of negligence, although the other party was also negligent, and even though he was on the wrong side of the road.† "It is a well settled principle," said the court, "that to entitle the plaintiff to recover, he must show the injury to have been attributable to the imprudence of the defendant, and under such circumstances as to exonerate himself from all neglect of duty on his part."‡ So in the same State, in an action against towns for neglecting to keep the roads in repair, the plaintiff does not entitle himself to a verdict by establishing the fact of a defective highway and damage resulting therefrom, unless he also show that he was using ordinary care and diligence in traveling upon the road.§ But it is not necessary in the declaration to aver the exercise of ordinary care;|| it is sufficient if the fact so appear, and this burden of proof he assumes.¶ So in Massachusetts, if the accident happen on a Sunday, when traveling

\* *Persons vs. Parker*, 3 Barb. S. C. R., 249. *Carlisle vs. Holton*, 3 La. Ann. R., 48. *Moshier vs. U. & S. R. R. Co.*, 8 Barb. S. C. R., 427. *Murphy vs. Diamond*, 3 La. Ann. R., 441. *Bathbun vs. Payne*, 19 Wend., 898. *Spencer vs. Utica & Sch'y R. R. Co.*, 6 Barb. S. C. R., 387. *Pluckwell vs. Wilson*, 5 Car. & Payne, 379. *Williams vs. Holland*, 6 Car. & Payne, 28. *Hawkins vs. Cooper*, 3 C. & P., 473. *Brand vs. Troy & S. R. Co.*, 8 Barb. S. C. R., 368.

† *Parker vs. Adams*, 12 Met., 415.

‡ See, also, *Halderman vs. Beckwith*, 4 McLean, 286; and *Lane vs. Crombie*, 12 Pick., 177. Also, *Moore vs. The Mayor of Shreveport*, 3 La. Ann. R., 645. See, also, in Maine, *Kennard vs. Burton*, 12 Shipley, 39; and in Vermont, *Rice vs. Montpelier*, 19 Verm., 471.

§ *Thompson vs. Inhab. of Bridgewater*, 7 Pick., 188. *Adams vs. Inhabitants of Carlisle*, 21 Pick., 146.

|| *May vs. Inhab. of Princeton*, 11 Met., 442.

¶ *Tourtillot vs. Rosebrook*, 11 Met., 460. *Adams vs. Inhab. of Carlisle*, 21 Pick., 146.

is forbidden except for necessity or charity, the plaintiff is bound to show that the traveling was of that character.\* And in England, the rule has been carried so far, that one who sustains an injury from a carriage or vessel, cannot maintain an action against the owners of such carriage or vessel if negligence either on his own part or on the part of those having the guidance of the carriage or vessel in which he is a passenger, conduced to the accident, and if such injury might have been avoided by the exercise of reasonable care either on his or their part.†

This general principle applies to all cases where injuries to person or property arising from negligence form the subject of inquiry. Of these, cases of collision between carriages, and vessels, form a considerable class. And in these as in other cases, where negligence or infringement of the rights of others is complained of, the general rule appears to be that at law the plaintiff, in order to recover, must be able to show that he has not in any way contributed to the accident; on the other hand, although he may have been in the wrong, still, if his error did not aggravate the difficulty, his right to relief will be unprejudiced. But the mere fact of the conduct of the plaintiff not being strictly regular, is immaterial; the inquiry is whether his irregularity has augmented the mischief; if so, as the law is inadequate to apportion the wrong, there can be no recovery.

So in another case in England, where the defendant undertook to excuse himself by throwing the blame of the accident on the plaintiff, this language was held: "If the plaintiff's servants substantially contributed to the injury by their improper or negligent conduct, the defendant would be entitled to a verdict; but if the injury was occasioned by the improper or negligent conduct of the defendant's servants, and the plaintiff's servants did not substantially contribute to produce it, then the plaintiff would be entitled to the verdict."‡

So said the English Exchequer in a recent case: "There may have been negligence in both parties, and yet the plaintiff

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\* *Bosworth vs. Inhab. of Swansea*, 10 Met., 868.

† *Thorogood vs. Bryan*, 8 Man. Gr. & Scott, 114, and *Catlin vs. Hills*, ib., 128. I confess this seems to me an indiscreet extension of the rule, as when both the carriers are in fault, all redress is practically denied.

‡ *Sills vs. Brown*, 9 Car. & Payne, 601.

may be entitled to recover. The rule is, that although there may have been negligence on the part of the plaintiff, yet unless he might, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence, he is entitled to recover; if by ordinary care he might have avoided them, he is the author of his own wrong.\*

This doctrine has been approved by the Supreme Court of Connecticut, in a case† where it was said, "the defendant shall not be permitted to shield himself from an injury which he has committed, because the party injured was in the wrong, unless such wrong contributed to produce the injury."‡

Whether this doctrine, in its broad extent, is applicable to infants of tender years, may be considered uncertain. In England it has been held, in a suit brought by the guardian of an infant injured by the defendant's negligence, that though the carelessness of the child was a coöperating cause of his misfortune, still he could recover, as his misconduct bore no proportion to that of the defendant.§ But in New York, in a very similar case, it was said that infants could not be exempted from legal rules when suing for redress, and the right to recover was denied.|| In Connecticut and Vermont, however, the case of *Lynch vs. Nurdin* has been cited with approbation; and in the former State it has been said, "what would be but ordinary neglect in regard to one whom the defendant supposed a person of full age and capacity, would be gross neglect as to a child, or one known to be incapable of escaping danger."¶

Another modification or qualification of the general rule, that the concurrence of the plaintiff's negligence with that of the defendant, will defeat the claim for redress has been laid down in New York; and it has been said that "where one in the lawful use of his property put it in an exposed or hazardous position, and in more than ordinary danger from the lawful acts of others, as for instance, if he build near a railroad, still he

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\* *Bridge vs. Grand J. R. Co.*, 8 Mees. & Wels., 244. S. P., cited in *Davies vs. Mann*, 10 Mees. & W., 546. *Marriott vs. Stanley*, 1 Man. & Gr., 568.

† *New Haven Steamboat & T. Co. vs. Vanderbilt*, 16 Conn., 420. See, also, *Beers vs. Housatonic R. R. Co.*, 19 Conn., 566, S. P.

‡ See, also, *Raisin vs. Mitchell*, 9 Car. & Payne, 618.

§ *Lynch vs. Nurdin*, 1 Q. B., 29.

|| *Hartfield vs. Roper*, 21 Wend., 615.

¶ *Robinson vs. Cone*, 22 Verm., 213. *Birge vs. Gardiner*, 19 Conn., 507.

does not lose his remedy for an injury caused by the culpable negligence of others.”\* And the same principle has been recently declared in England, where it has been said that the defendant is not excused merely because the plaintiff knew that some danger existed, and voluntarily incurred such danger, provided the defendant's negligence was the cause of the damage, the whole matter being for the consideration of the jury.†

So, also, it has been said in New York, that the plaintiff's negligence does not excuse injuries inflicted by design. “A wrongdoer is not necessarily an outlaw, but may justly complain of wanton and malicious mischief.”‡

In England, it has been declared to be the general rule, that a party has no right to sue for damages in a civil action for any act which amounts to felony, until the felon is prosecuted and acquitted or convicted; and the reason assigned is a desire to prevent the criminal justice of the kingdom from being defeated,§ as well as the fundamental principles of the feudal system. By that system, the commission of a felony worked a forfeiture of the feudatory's grant and the forfeiture extending to the whole property of the felon, and the crime being capital and punished by death, nothing remained to satisfy a private demand, and no person against whom the action could be brought. But it seems that such is not the law in this country.¶

The subject of remote and consequential damages in cases of tort, we have already considered elsewhere.¶ And we have also had occasion to call attention to cases bearing on this point, in which it has been held, that the fact of the plaintiff being indemnified by charity or otherwise, cannot be set up by a wrongdoer in diminution of the amount which he is liable to pay.\*\*

In closing this branch of our subject, it ought to be observed, that while, where circumstances of aggravation are

\* *Cook vs. Champlain Transport'n Co.*, 1 Denio, 91.

† *Clayard vs. Dethick et al.*, 12 Q. B., 487.

‡ *Tonawanda R. R. Co. vs. Munger*, 5 Denio, 255.

§ *Crosby vs. Leng*, 18 East, 409.

¶ *Boardman vs. Gore*, 15 Mass., 336. *Ocean Co. vs. Fields*, 2 Story, 59. *Plummer vs. Webb*, Ware Rep., 78.

¶ *Supra*, 57, et seq. See, too, on this subject, *Molinæus, De eo quod Int.*, § 177.

\*\* *Vide ante*, 39.



proved, the jury are the necessary as well as the rightful judges of the amount of relief, on the other hand, where no such facts are presented, too much care cannot be taken to apply settled rules to the subject of compensation. It can make no difference whether the action be one nominally *ex contractu* or *ex delicto*, whether for the breach of a contract or the violation of a right; in either case, if no evil motive be imputed, the amount of compensation is as much a matter of law as the right itself, and can, with no greater safety, be submitted to the vague and fluctuating discretion of a jury.\*

We shall, in discussing the cases which arise under the present branch of our subject, first consider those where, though the proceeding be nominally in tort, no circumstance of aggravation is proved, and where the law undertakes to apply a fixed measure of compensation.

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\* Vide post, Ch. XXII.

In an action on the case for fraud in the sale of personal property, it is said to be the well settled doctrine in Kentucky, that vindictive damages cannot be given. *Singleton's Adm'r vs. Kennedy & Co.*, 9 Ben Monroe, 222. And the court considered that they could not be given in like cases in Louisiana. But they may be given in Kentucky, where a trespass is committed willfully and in a high handed manner. *Jennings vs. Maddox*, 8 B. Monroe, 430.

The precise demarkation of the cases in which exemplary or vindictive damages are allowed, has not yet been made in any distinct manner. In all actions of tort accompanied by violence, malice, or oppression, they are undoubtedly recoverable; but how far in cases of tort, mere fraud will found a claim for them is not yet determined. In many cases of fraud the courts have declared a fixed and uniform rule, which, of course, excludes all idea of vindictive or exemplary damages. But there are many other cases where fraud, though unattended by violence, is accompanied by gross malice and manifest design to injure; and in these it would seem that they should be allowed.

## CHAPTER XIX.

### THE RULE OF DAMAGES IN ACTIONS BROUGHT FOR THE MISAPPROPRIATION OR CONVERSION OF PERSONAL PROPERTY—TROVER.

The General Rule is the value of the Property converted—Special Damages, whether recoverable—Value, whether estimated at time of conversion or at time of trial—Where Plaintiff claims a special property, or by virtue of a lien—Where the defendant has bestowed labor on the property—In regard to Choses in Action—Interest—Mitigation of Damages.

In treating of the subject of torts we shall first discuss those cases, which, being unattended by any circumstances of aggravation, are regarded entirely as under the control of the court, and in which a fixed rule of damages is maintained as matter of law. These cases are treated, for our present purpose, as contracts, and compensation is awarded on fixed legal principles. Where, on the other hand, the amount of relief is submitted to the discretion of the jury, few questions present themselves as to the measure of damages.

Trover is the form of action adopted where damages are demanded for specific personal property which has been wrongfully appropriated, or in more technical language, converted to the use of any other than its rightful owner. It is often brought in cases where assumpsit, and in others where trespass or replevin, would lie.\*

The consequences flowing from the election of assumpsit are well stated in the language of Lord C. J. Ellenborough. "In bringing an action for money had and received, instead of trover, the plaintiff does no more than waive any complaint with a view to damages for the tortious act by which the goods were converted into money, and takes to the net proceeds of the sale as the value of the goods, subject of course to all the con-

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\* *Barker vs. Cory*, 15 Ohio, 9.

sequences of considering the demand in question as a *debt*, and amongst others, to that of the defendants having a right of set-off if they should happen to have any counter demand against the plaintiff."\*

But where trover is adopted, the general proposition may be laid down, that the value of the property converted is the measure of damages. This, however, is subject to many qualifications.

It is proper, perhaps, before entering on the general discussion, to take notice of an exception to which is applied the term of *pretium affectionis*. It has been intimated in many cases, though perhaps never as yet directly decided, that where the property in question had for some particular reason a peculiar value to its owner, as a picture to a relative, a manuscript to a defendant, and so in many other cases that may be supposed, it would be proper for the jury instead of confining themselves to the rigid estimate of value, of which, perhaps, there might be no criterion, to give an enhanced remuneration for the peculiar estimate in which the true owner held the article in question, as a *pretium affectionis*. It is very difficult to reduce remuneration of this kind to principle or settled rule. In cases of intentional wrong the rule of vindictive damages covers the case. But when such is not the case, how far should a plaintiff be remunerated, for what is in truth an injury to his feelings? As a general rule, injuries to the feelings of the plaintiff are not subjects of legal recompense, except when the wrong is malicious. To authorize such a recovery, it would seem to be essential at least that the defendant should have been apprised of the peculiar value set upon the property by the owner, and that he should have disregarded his feelings. And then again, to what extent shall the jury go in their endeavor to appreciate the various motives that may enter into the plaintiff's estimate of the article? There would seem to be great intrinsic difficulty in permitting recovery on these grounds. In Mississippi the difficulty has been partially got over in regard to slaves, by permitting the owner to seek equitable relief, and to claim a specific return of the property,

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\* Hunter vs. Prinsep, 10 East, 878, 891. Greenleaf on Evidence, Vol. II., §18. Vide Ante, 41, in notes.

where at common law he would have been limited to an action for damages.\*

In one of the earliest cases on the subject of damages in trover,† where the action was brought for a jewel, several of the trade being examined to prove what a jewel of the first water, of the size in question, would be worth, the Chief Justice of the King's Bench directed the jury, that unless the defendant produced the jewel and showed it not to be of the first water, "they should presume the strongest against him, and make the value of the best jewels the measure of their damages," which they did.

"The general rule in trover," said Patterson, J.,‡ "is that the damages are measured by the value of the thing taken. I never knew of any attempt to reduce the damages by showing the manner in which the goods were seized." And in this case, it being specially pleaded that the defendant did not convert the goods claimed, a horse and cart, evidence was refused to show that they did not belong to the plaintiff.§

It has, however, been intimated that special damages may be recovered in this action for the detention of the property, over and above its value. It was suggested|| by Parke, B., at nisi prius, that the plaintiff could recover special damages if laid in the declaration; as in trover for the conversion of a horse, that the plaintiff could recover for money paid for the hire of other horses. And it has been so since decided by the Queen's Bench, in trover brought by a carpenter for his tools; the declaration containing an allegation, that by reason of the conversion the plaintiff was prevented from working at his trade.¶ In this country, however, it seems doubtful; the doubt resulting from the technical form of the action, as well

\* *Butler vs. Hicks*, 11 Sm. & Marsh., 78. *Hull vs. Clark*, 14 Sm. & Marsh., 187.

† *Amory vs. Delamirie*, 1 Strange, 505.

‡ *Finch vs. Blount*, 7 Car. & Payne, 478.

§ "The value of the goods which have not been returned," said Patterson, J., in *Cook vs. Hartle*, 8 Car. & Payne, 568, "is the proper measure of damages."

|| *Davis vs. Oswald*, 7 Car. & Payne, 804.

¶ *Bodley vs. Reynolds*, 21 April, 1846, 8 Q. B., 779. See, also, *Moon vs. Raphael*, 2 Bing., N. C., 810, an action of trover, in which Tindal, C. J., said, "The injury of which the plaintiffs complain not being a damage necessarily consequent on the wrongful conversion of the goods, if it could in any shape fall within the remedy of an action of trover, ought at least to have formed the subject of a special allegation."

as from the question as to remoteness or consequentiality of damage.\*

The general rule, making the value of the property the measure of damages, is, as has been said, subject to many qualifications, and the questions that arise as to compensation in this action, may be regarded in six points of view. *First*, as to the time when the value of the property is to be estimated, in a case of simple conversion. *Secondly*, how far this value is affected by the right in which the plaintiff claims. *Thirdly*, what is the rule when the property has been changed, or increased in value, as where logs have been made into plank, cloth into clothes, or the defendant has otherwise bestowed his labor on it. *Fourthly*, what the rule is where the controversy relates to negotiable paper, or other choses in action. *Fifthly*, as to interest; and *lastly*, as to mitigation. It should be noticed here, that it is well settled in this country that the rule of damages in this form of action is a pure question of law. "The jury," said the Supreme Court of New York,† "are to ascertain the quantum of damages, according to the rules of law:" such is the language of all the cases; and such, indeed, the reasonable rule; for trover, though nominally an action of tort, is usually brought to establish a mere right of property, and does not, like trespass, admit of evidence in aggravation.‡

Where a particular chattel has been wrongfully appropriated by the defendant, if the chattel is of fixed value, there

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\* See *Brizzees vs. Maybee*, 21 Wend., 144; and in Pennsylvania, see *Farmers' Bank vs. Mackie*, 2 Barr. State R., 818; *Starkie Evid.*, P. 2, 1165, Art. Trover. In *Stevens vs. Low*, 3 Hill, 182, where goods having been sold at an agreed price, to be paid in notes, and delivered conditionally, and the condition being broken, trover was brought for the goods, the court said that if assumpsit had been brought, the plaintiff would have been entitled to the *agreed* value; but that in trover the *value* and interest was the true measure, and that the defendant was at liberty to show that the value of the property was much less than the agreed price. And this is in accordance with the analogous cases brought on implied or express warranties of chattels.

† *Savage, C. J.*, in *Baker vs. Wheeler*, 8 Wendell, 505.

‡ In England, however, as we shall see, this seems by no means clear; and from the cases of *Greening vs. Wilkinson*, 1 Car. & Payne, 625, and *Whitehouse vs. Atkinson*, 3 Car. & Payne, 844, cited hereafter, it would appear that very much is left to the jury in each particular case.

So in *Alder vs. Keighley*, 15 M. & Wels., 117, Pollock, C. B., said, "If this had been an action of trover for the bill, no doubt it would have been altogether a question for the jury as to the amount of damages."

seems no difficulty in arriving at a correct measure of damages; but if the property be of fluctuating value, and its value or price has actually varied between the period of the wrongful appropriation, or conversion, and of the trial, a question at once arises, *at what time* should the value be estimated. And several analogies of the subject, which we have already considered, at once suggest themselves to the mind. The rightful proprietor in these cases is deprived of the use of his property to the time of trial; and we have seen upon sales of chattels, where the price is paid in advance, and also in regard to stock contracts, that the defendant has on this ground been sometimes compelled to pay the highest value during his unlawful possession; while in other cases, this consideration has not been allowed any weight. The same doubts exist in regard to the rule of damages in the form of action which we are now considering.

This question was early considered by Lord Mansfield,\* where a motion was made to stay proceedings on bringing the chattel into court with costs to that time. The rule was refused on the circumstances of the particular case; but his lordship said:

"Where trover is brought for a specific chattel, of an ascertained quantity and quality, and unattended with any circumstances that can enhance the damages above the real value, but that its real and ascertained value must be the sole measure of damages, there the specific thing demanded may be brought into court; where there is an uncertainty either as to the quantity or quality of the thing demanded, or that there is any tort accompanying it that may enhance the damages above the real value of the thing, and there is no rule thereby to estimate the additional value, then it shall not be brought in." \* \* "In trover for money numbered, or in a bag, the jury may give more in damages; they may allow interest, and in some cases they ought." \* \* "When the thing clearly remains of the same value, yet the jury may give damages for the detention; and this ought to be done, because at the trial, when the thing remains in the same condition, there generally is a rule to deliver it."†

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\* *Fisher vs. Prince*, 8 Burrows, 1863, (1762).

† It may be remarked on this case, that this practice of staying proceedings on delivery of the property, though still in use in England, *Earle vs. Holderness*, 4 Bing., 462; *Tucker vs. Wright*, 8 Bing., 601, and 1 C. & M., 544, is, it is believed, little known in this country (*Shotwell vs. Wendover*, 1 J. R., 65), the courts not exercising such summary power over the proceedings.

In *Stevens vs. Low*, 2 Hill, 182, Cowen, J., said, however, "It is quite common for the courts to make a rule, stopping the action on a re-delivery and payment of costs." The reports of our decisions would not seem to warrant the remark.

A good deal of latitude is here evidently taken as to the *value* of the property, though nothing is said as to the *time* at which the estimate is to be made. The discussion also seems to assume that additional damages may be given for any tort accompanying the conversion, a point which we shall have occasion hereafter to notice; and interest and damages for detention are both spoken of as proper in particular cases.\*

At nisi prius, Lord Ellenborough in an action of trover† for bills, limited the plaintiff's recovery to the amount of principal and interest at the time of the conversion. But in another case,‡ where trover was brought for East India Company warrants for cotton, which had risen from sixpence per pound at the time of the conversion, to tenpence-halfpenny, Abbott, C. J., pronounced the case of *Mercer vs. Jones* to be "hardly law," and said:

"The amount of damage is for the jury, who may give the value at the time of the conversion or any subsequent time in their discretion; because the plaintiff might have had a good opportunity of selling the goods if they had not been detained. My opinion is, that the jury are not at all limited, in giving their verdict, by what was the price of the article on the day of the conversion."

In a subsequent case§ the same eminent judge said, that the plaintiff was not bound by the sum at which goods were sold by the defendant at auction, "but where the plaintiff is an assignee, who must have sold the goods if they had come to his hands before any sale by the sheriff, it *often happens that a jury considers* the sum at which the goods were actually sold at auction, as a fair measure of damages."

These decisions seem to leave the rule of damages in England, as to the time at which the value is to be estimated, and

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\* The case of *Whitton vs. Fuller*, 2 W. Black., 902, was a motion by defendant in an action of trover for a bond, to have proceedings stayed on delivering up the bond and paying costs. But the plaintiff objecting that he had sustained great loss by the detention of the bond till after the death of the obligor, and insisting on his right to go for special damages, the motion was denied.

And in *Parker vs. Norton*, 6 Term R., 695, an action of trover, Lawes said, *arguendo* in support of a demurrer to a plea of a bankrupt discharge,—“In some actions of trover, indeed, the specific value of the thing converted may be a criterion, but in others it is by no means the measure of damages.” And the demurrer was held good.

† *Mercer vs. Jones*, 8 Camp., 476.

‡ *Greening vs. Wilkinson*, 1 Car. & Payne, 625.

§ *Whitehouse, Assignee, vs. Atkinson, Sheriff*, 3 Car. & Payne, 344.

even as to the value itself, very much to the discretion of the jury. And such is the apparent construction of the recent statute,\* by which it is declared, that in all actions of trover, the jury may, if they shall think fit, give damages in the nature of interest over and above the value of the goods at the time of the conversion.

But if we were to adhere to the analogy of the cases that have been decided there as to stock contracts,† we should say that the rule of damages, when the value of the chattel is fluctuating, ought to be the highest value between the conversion and the trial. And this appears to be the rule in New York. In one case,‡ indeed, it was said that it was undoubtedly correct to give, as the damages in trover, the full value of the property *at the time of conversion*, and interest thereon from that time. But this is not the rule.§

In an action of assumpsit,|| brought to recover the value of a pledge given and appropriated, and which we have already had occasion to cite more at large, Kent, J., said,

“The value of the chattel *at the time of the conversion* is not in all cases the rule of damages in trover. If the thing be of a determinate and fixed value, it may be the rule; but where there is an uncertainty or fluctuation attending the value of the chattel, and it afterwards rises in value, the plaintiff can only be indemnified by giving him the price of it at the time he calls upon the defendant to restore it; and one of the cases even carries down the value to the time of the trial.”

Again in an action of assumpsit,¶ on a note payable in specific articles, the court held the measure of damages to be the highest market price of the articles in question, at any time between the notes falling due and the time of the trial, saying, “In trover, if the chattel be not of a fixed determinate value its worth at the time of conversion is not the rule of damages, but they may be enhanced according to the increased value of the chattel subsequent to that time.”\*\*

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\* 8 & 4 W. IV., 42, § 29, (Aug. 14, 1838).

† *Shepherd vs. Johnson*, 2 East, 211; *supra*, 261.

‡ *Dillenback vs. Jerome*, 7 Cowen, 294.

§ In *Shotwell vs. Wendover*, 1 J. R., 65, the court said, the plaintiff has a right to claim damages for the use of the articles (tools, &c.), and for their deterioration while in the possession of the defendant.

|| *Cortelyou vs. Lansing*, 2 Caines' Cases in Error, 200; *supra*, 265.

¶ *West vs. Wentworth*, 3 Cowen, 82.

\*\* The case of *Kennedy vs. Strong*, 14 J. R., 128, is therefore to be taken, subject



In Massachusetts, on the other hand, the value of the goods at the time of the conversion seems to be the rule.\* The Supreme Court say, "We see no reason for departing from the rule which we think has been invariably practiced upon in this State, that in actions of trover, the value of the article sued for at the time of the conversion is to fix the damages."† Where

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to the foregoing observations. That was an action of trover, and the plaintiff proved the value of the goods at the time of conversion, but gave no evidence of the price they actually brought. A point being made as to the measure of damages, Thompson, J., said, "It is a general rule in trover, that the measure of damages is the value of the property at the time of the conversion."

See, also, to S. P., Baldwin's Administrators *vs.* Harvey, Anthon's N. P., 166.

In *Hallett vs. Novion*, 14 J. R., 278, where trover was brought for a vessel illegally captured on the high seas, the judge who tried the cause held, that the measure of damages was the value of the cargo at the time and place of capture, with such additional damages as would be equal to the interest thereon, and that the jury in determining such value, ought to allow the prices of cargo at New York, for which port the vessel was bound when taken, deducting a reasonable premium of insurance from the place of capture to New York; the restoration of the brig, and the avails of the cargo, or any part of it which the plaintiff had received, of course going in mitigation of damages. This case, so far as it takes the time of capture as establishing the rule of damages, does not agree with those above cited; but as the case was reversed in error, 18 J. R., 327, on the ground that the capture was a matter of exclusive admiralty jurisdiction, it can hardly be regarded as an authority.

\* *Kennedy vs. Whitwell*, 4 Pick., 466.

† See, also, *Sargent vs. Franklin Insurance Co.*, 8 Pick., 90, and *Greenfield Bank vs. Leavitt*, 17 Pick., 1, and *Johnson vs. Sumner*, 1 Metcalf, 172. "The general rule of damages," says Morton, J., in *Pierce vs. Benjamin*, 14 Pick., 856, "in actions of trover, is unquestionably the value of the property taken at the time of the conversion." See, also, *Fowler vs. Gilman*, 18 Met., 267. In *Barry vs. Bennett*, 7 Metcalf, 854, it was held in Massachusetts, that in trover by a mortgagee of property against one who purchased it of the mortgagor after it was mortgaged, and sold it to a stranger, the damages are the value of the property and interest thereon from the time of the sale by the defendant, and not from the time of his purchase.

So, also, in Kentucky, the rule takes the time of conversion. *Lillard vs. Whitaker*, 8 Bibb, 92; *Sproule vs. Ford*, 9 Littell, 25. See, also, *Oulton vs. Barnes*, Litt. Selected Cases, 187.

In Georgia, when the property is of an undeviating value, what is proven to be its worth when converted seems to be the criterion of damages. When the value fluctuates, the rule seems in that State unsettled. *Foster vs. Brooks*, 6 Georgia, 287. But evidence may be given of the value at the time of trial, as well as of conversion. *Schley vs. Lyon*, 6 Georgia, 580.

In *Watt vs. Potter*, 2 Mason, 76, the rule of the value at the time of the conversion was laid down by Story, J. Watt, the plaintiff, sent a cargo of rum to Quebec. The master went into Newport, and there fraudulently (as was alleged) sold the vessel. The cargo in question (the importation of goods by British vessels from British colonies being prohibited) was landed and stored with the defendant. He refused to deliver to the plaintiff's agent, and claimed in the suit to deduct from the market value the amount of duties on the rum. Story, J., said to the jury: "The last question is, what is the rule by which the damages, if the plaintiff be entitled to recover, are to be assessed. I am of opinion that the true rule is the value of the property at the mar-

trover is brought for slaves, the rule of damages seems to be the value of the property at the time of the conversion, and the value of their labor from that time in addition to the value of the property.\*

I have already had occasion to notice the claim of damages for the rise of property, which has been sold and its price paid between the time when the cause of action accrues and that of trial,† and the analogous question where the use of property is withheld;‡ and we have seen that different rules have been prescribed by different tribunals. The same analogies should govern in trover; and it appears to me, that, on principle, unless the plaintiff has been deprived of some particular use of his property, of which the other party was apprised, and which he may be thus said to have directly prevented, the rights of the parties are fixed at the time of the illegal act, be it refusal to deliver, or actual conversion, and that the damages should be estimated as at that time.§

There are many cases, however, where the plaintiff, though entitled to recover, is not at liberty to receive the full value of the property. So in cases of pledge, if the pledgee tortiously sell the pledge or otherwise wrongfully put it out of his power to return the article pledged, the pledgor's right of recovery is

ket price, at the time of the conversion. The defendant claims to have a deduction made of the amount of duties which would accrue on the rum if regularly imported. At first I inclined to think this deduction was reasonable; but on reflection, I have changed my opinion. No duties have been paid upon the rum; no duties are by law payable, for the rum was prohibited from importation from Jamaica in a British vessel, by the recent act of Congress. The defendant never gave any bonds for the payment of duties, and is in no shape liable to pay them. The rum was landed for reexportation, and the plaintiff was desirous, with the consent of government, of reexporting it; but the defendant has wrongfully prevented the reexportation. What right, then, can the defendant have to an allowance for duties which he has never paid, and is not liable to pay? What reason is there, that the plaintiff should suffer a loss which has been occasioned by a tortious conversion of the defendant? In my judgment, it does not lie in the mouth of a wrongdoer to set up such a claim. The duties may never yet become payable, and but for the wrongful act of the defendant would not become payable; and if any loss be sustained, it should be borne by the party through whose instrumentality it has occurred, and not by an innocent shipper."

\* *Banks vs. Hatton*, 1 Nott & McCord, 221. *Schley vs. Lyon*, 6 Georgia, 530.

† *Supra*, 246, et seq.

‡ *Supra*, 282, et seq.

§ I am happy to find this language approved of by the Supreme Court of Louisiana, in *Arrowsmith vs. Gordon*, 3 La. Ann. R., 105, where an action analogous to the common law action of trover was brought for an alleged conversion of cotton.

clear; but the pledgee in such action has a right to have the amount of his debt recouped in the damage.\*

The value of the goods, also, ceases to be the measure of relief when the plaintiff brings his action by virtue of a special property, as for instance a lien. Here the measure of damages is the *lien*. So† where trover was brought for fifty hogsheads of tobacco, the master claiming by reason of his lien on the freight for advances and wages.‡ This supposes, however, that the value of the goods exceeds the lien; for if it is otherwise, still the recovery cannot go beyond that value, and the amount recovered, therefore, must in such a case be less than the plaintiff's lien.

This is still subject, however, to a farther consideration. Where the lien creditor sues a stranger, the plaintiff may recover the full value of the goods, holding the balance beyond his own claim as trustee, for the general owner. But where the party claiming a lien endeavors to enforce it against the true owner in this form of action, he can only recover the amount of his lien.§

So in Vermont, where the defendant leased the plaintiff a farm for a year, and was to provide a horse to use on the farm during the term. He furnished one, but took him away and sold him. It was held that the plaintiff acquired a special property in the horse, and in an action of trover could recover damages for the use of him during the residue of the term.||

In New York, where a constable having levied on certain goods, by virtue of executions, on which \$81 30 was due, brought trover for them, and recovered their full value, \$108, it was held on a motion for a new trial that he could only recover to the amount of the executions, and the verdict was reduced to that sum.¶ This case may appear to conflict with the rule above laid down; but the defendants were purchasers of

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\* Bac. Abr., Bailment B., *Jarvis vs. Rogers*, 15 Mass., 389. *Stearns vs. Marsh*, 4 Denio, 327. Story on Bailments, 2d ed., 815, 849.

† *Ingersoll vs. Van Bokkelin*, 7 Cow., 670.

‡ This case was reversed in error, 5 Wend., 815, on the ground that the master had no lien for his wages; but the right as to his advances was affirmed; and the rule of damages was not touched by the reversal.

§ See *Jarvis vs. Rogers*, 15 Mass., 389, where the rule of damages in cases of lien was much discussed; and also *Lyle vs. Barker*, 5 Binney, 457-60.

|| *Hickok vs. Buck*, 22 Verm., 149.

¶ *Spoor vs. Holland*, 8 Wend., 445.

the property, and if the plaintiff had recovered the full value, he must have held the balance beyond his execution for their benefit. It was an action against the general owner, and not against a stranger.\* So where the plaintiff had been endeavoring to baffle his creditors by an ostensible transfer of the property sued for, it was left to the jury to find a verdict for the plaintiff's real and bona fide interest; and though the goods were worth £21, the verdict was for one-fourth of a penny.†

The action of trover, as well as that of trespass, often presents interesting questions connected with what is technically termed confusion.‡ “If,” says Blackstone,§ “one willfully intermixes his money, corn, or hay, with that of another man, without his approbation or knowledge, or casts gold in like manner into another's melting pot or crucible, our law to guard against fraud allows no remedy in such a case, but gives the entire property, without any account, to him whose original dominion is invaded and endeavored to be rendered uncertain without his own consent.” The same principle has been applied to cases where subsequent to the illegal taking or conversion the defendant increases the value of the property by bestowing his labor in any way on it. It seems to be well settled, that, as a general rule, personal property illegally or tortiously held, can be retaken by the rightful owner in any new form into which it may be put by the labor of the defendant, without reference to the increase of value by such change of form. Thus, cloth

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\* So in Connecticut, in an action of trover brought by a second mortgagee against a stranger, it was insisted that the plaintiff could only recover the value of his interest, i. e. its value after deducting the amount due on the prior mortgage; but it was held otherwise, and the court said, “In actions of trover and trespass for property taken and converted by the defendant, where there is no malicious motive on his part, but he takes the property under a claim of right, and the real dispute is as to the title, the rule of damages is the value of the property at the time of the conversion or taking, and interest on that sum to the time of judgment. If, however, the suit is brought by a bailee or special-property man against the general owner, then the plaintiff can recover the value of his special property only; but if the suit is against a stranger, then he recovers the value of the property and interest according to the general rule, and holds the balance beyond his own interest in trust for the general owner.” *White vs. Webb*, 15 Conn., 502.

† *Cameron vs. Wynch*, 2 Car. & Kir., 264.

‡ Confusion, Lat. *Confusio*. *Confundi dicitur, quod aliis ita commiscetur ut deduci et separari non possit, aut certe difficilis sit ejus separatio*. Vicat. Vocab., Utriusque Juris, in Voc. The term is applied also to the merger of different interests, and in this sense the analogous word is used in the French law. Crivelli, in Voc.

§ Comm. 2, Ch. 26.

made into garments, leather into shoes, trees hewn or sawed into timber, and iron made into bars, may be reclaimed by the original owner, in their new and improved state. The increased value belongs to the rightful owner of the property.

The action of trover does not, it is true, recover the specific property. But the same principle has been applied to this form of action, and the value of the property in its new and improved state thus becomes the measure of damages. Nor is the rule departed from, unless the thing converted has been annexed to and made a part of some other thing, of which it becomes the principal, or its nature is changed from personal into real property.\*

This principle was adhered to in New York, in an action of trespass,† where timber had been converted into shingles. And again in an action of trover,‡ brought for wood converted into coals; the court there saying, “a *willful trespasser* cannot acquire a title to property, merely by changing it from one species to another.” And again in an action of trover,§ where black salts were converted into pearl ashes.

The doctrine has, however, been much questioned in the same State,|| where certain logs had been cut on the plaintiff's land, drawn to the defendant's mill, and converted into boards (the value of the logs being \$187 56, of the boards \$309 46, and the difference \$125 90); and the judge charged that the measure of damages would be the value of the boards without reference to the price of the defendant's labor, and the jury gave \$309 46. It was insisted, on a motion for a new trial, that in trover, where the conversion was the gist of the action, and the character of the original taking not inquired into, the damages should be confined to the value of the thing as taken, or the value of the defendant's labor deducted; and that even if the rule laid down at the trial were sound in *trespass*, it could not apply here, because the plaintiff had elected to bring trover.

\* This seems the doctrine since the Year Books. *Si homo prius arbores and puis il fait boards de eux, uncore le owner poit eux reprendre, quia major pars substantia remanet.* F. Moor. Rep., 20 pl., 875. 5 Hen. VII., 15. 12 Hen. VIII., 10. Viner Abr., Property (E.) pl. 5. Silsbury vs. McCoon, 6 Hill, 425.

† Betts vs. Lee, 5 J. R., 848.

‡ Curtis vs. Groat, 6 J. R., 468.

§ Babcock vs. Gill, 10 J. R., 287.

|| Brown vs. Sax, 7 Cowen, 95.

The court held otherwise, on the authority of the previous cases. But Sutherland, J., dissented. He admitted that where the taking was *willful and tortious*, this rule would not be oppressive or unjust. But that as the mode of taking could not, in trover, be inquired into, no such general rule could be laid down. He put the case of jewels lodged with a banker for safe custody, and pawned by him, and set at great expense by the pawnee; could the rightful owner in trover against the pawnee obtain the jewels as set, without deduction for the labor of setting? The question is very pertinent, and difficult of reply, on the authorities. But a new trial was denied.

The same point was again decided in the same State,\* in an action of trover for logs converted into boards. But it is to be remarked that in both these cases the court noticed the fact that there was undoubtedly a tortious taking by the defendant. How the question would be disposed of in a case where the taking appeared to be *bona fide*, and how the principle could be got over, that in trover the taking is only inducement not to be traversed, and the conversion the gist of the action, remains yet to be decided.†

It is expressly said in the old books, that no allowance can be made in trover for the tortious taking. Thus,‡ “if the goods of I. S. have been taken by I. N., in such a tortious manner that an action of trespass would lie, an action of trover will likewise lie; but I. S. can only recover in the latter action damages for the conversion of the goods, inasmuch as he does, by electing to bring an action of trover, waive his right to recover damages for the tortious taking.” Although Lord Mansfield, as we have above seen, in *Fisher vs. Prince*, intimated a contrary opinion.

The question, it will be seen, is very material. It is not whether the plaintiff has or has not a right to follow his property in its altered state; but whether having waived a form

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\* *Baker vs. Wheeler*, 8 Wend., 505.

† In *Pierce vs. Schenck*, 3 Hill, 28, trover for logs partially converted into boards, Nelson, C. J., and Bronson, J., said, the question whether the plaintiff could recover as damages the value of the boards, was not distinctly raised. They agreed that the plaintiff was entitled to recover the value of all the logs. See this case commented on in *Gregory vs. Stryker*, 2 Denio, 628.

‡ *Bacon Abr.*, Trover, A. 3.

of action which enables him to prove malice, he shall, in this proceeding, prevent the defendant from setting off or recouping expenses which he has laid out *bona fide* on the property, and which have actually enhanced its value.

The civil law does not in any case appear to recognize the severe rule of our system: "*Quod si frumentum Titii frumento tuo mistum fuerit, si quidem ex voluntate vestra, commune est, quia singula corpora, id est, singula grana quæ cujusque propria fuerunt, ex consensu vestro communicata sunt; quod si casu id mistum fuerit, vel Titius id miscuerit sine tua voluntate, non videtur commune esse quia singula corpora in sua substantia durant. Sed nec magis, istis casibus, commune sit frumentum quam grex intelligitur esse communis si pecora Titii tuis pecoribus mista fuerit.*"\*

Nor should the analogous case in regard to real property, be overlooked. In trespass for mesne profits, the *bona fide* occupant of land without notice, who has improved them, is allowed to set-off or recoup the value of his improvements. And such, as we shall see, is equally the case in regard to personal property when trespass is brought. Why should not the same equity be extended to the action of trover? I apprehend that whenever the question is distinctly presented, the milder rule will be maintained. Indeed, it has been so intimated in England.

Where goods were sent to a dyer,† who dyed them, and then insisted on a right to retain them, not only for the charges on them, but for a debt due for dying other goods, the Court of King's Bench held that he had no lien but for the price of dying the particular goods, and the plaintiff recovered; but the report adds, "the price of dying was deducted at the time of taking the verdict, the value of the goods in white being only thereby given to the plaintiff."

And the principle of this decision has been followed in Massachusetts, in a case where the plaintiffs made a conditional

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\* Inst., Lib. II., Tit. I., § 28. A different rule necessarily prevailed where separation was impossible. "*Sed et id quod in charta mea scribitur aut in tabula pinxitur, statim meum fit, licet de pictura quidam contra censerint propter pretium pictura; sed necesse est ei rei cedi quod sine illa esse non potest.*" Dig. de Rei Vindl., 28, § 3.

† Green vs. Farmer, 4 Burr., 2214.

sale of brown cotton goods to a printing company, who, after printing them, transferred them to the defendant, but did not comply with the conditions; and it was held that the plaintiffs could recover in trover, but the court was of opinion "that the plaintiffs were not entitled to recover the full value of the goods in the printed state. The value of them in their brown state appears to us a more just and equitable measure of damages, under all the circumstances of the case."\*

And in the same State, it has been said generally, that "where the plaintiff admits that the defendant has a lien on the property to a certain amount, that amount may be deducted by the jury in assessing damages."† In this case the plaintiff had admitted the defendant's lien by tendering its amount.‡

In Alabama, where wood had been converted and made into coal by the defendant, the owner was held entitled to bring trover for the coal. As to the question we are now considering, it was said "It is possible the jury might consider the value of the defendant's labor on the rough material," but as this point had not been presented, it was not decided.§

Where the property is owned by partners, and one partner sues, he is entitled to the value of his share without reference to the state of matters between him and his co-partner. So where on an execution against one of two partners, the sheriff illegally sold the interest of both, he was held liable in trover, and the measure of damages was held to be the value of the property converted, irrespective of the question whether the partnership

\* *Dresser Manufacturing Co. vs. Waterston*, 3 Met., 9.

In Maine, this doctrine of confusion of goods has been applied to a case where the defendant had taken the plaintiff's logs, and manufactured them into boards, and intermixed these boards with a pile of his own, so that they could not be distinguished, with the *fraudulent* intent of depriving the plaintiff of his property. And it was held that the owner of the logs might maintain replevin for the whole pile. *Wingate vs. Smith*, 20 Maine, 387. The question as to the propriety of making allowance for the labor of the defendant in such cases was considered by the Superior Court of Connecticut, in *Benjamin vs. Benjamin*, 15 Conn., 347, where grass had been converted into hay, but without arriving at any conclusion; the court thinking, on the particular facts of the case, that no such allowance should be made.

The original rule in England has been recently said (obiter, however), still to hold in trover. *Martin vs. Porter*, 5 Mees. & Wels., 302. But see contra, *Wood vs. Morewood*, 3 Q. B. R., 440, in notes; and post.

† *Fowler vs. Gilman*, 18 Met., 267.

‡ See, also, *Chamberlin vs. Shaw*, 18 Pick., 288.

§ *Riddle vs. Driver*, 12 Ala., 591.



was or was not solvent, and without regard to the state of the partnership accounts.\*

Where the property sued for in trover is a chose in action, as a bill, note, bond, or other security for the payment of money, it seems that the measure of damages is *prima facie* the amount due on the security, the defendant being at liberty to reduce that valuation by evidence showing payment, the insolvency of the maker, or any fact tending to invalidate the security.†

Lord Ellenborough held, as we have seen,‡ that the damages in actions for bills of exchange were to be estimated at the amount of the principal and interest due on the bills at the time of the demand and refusal; in other words, at the time of conversion. No doubt seems to have been entertained that the face of the bills was the *prima facie* measure of damages; and the same point was ruled in New York, with no limitation, however, as to the time to which interest was to be computed.§

Where trover was brought to recover a bill of exchange for £1600, which the bankrupt had deposited with the defendant, and on which, after a demand had been made for it and refused, he had raised the sum of £800, it was insisted that the damages should be only this latter sum; but it was held otherwise at the trial; and, upon argument for a new trial, Lord Abinger, C. B., said, "If the defendant will bring £800 into court and deliver up the bill, the verdict may be entered for a nominal sum; but he converted the whole bill, and the plaintiffs are entitled to recover the value of the whole at the time of

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\* Walsh *vs.* Adams, 8 Denio, 125.

† Evans *vs.* Kymer, 1 Barn. & Adol., 528. In this case it is said that the ancient form of proceeding in these cases was to bring detinue to recover the specific chattel, whereas in trover damages only are recovered. See, in Louisiana, New Orleans Draining Co. *vs.* De Lezardi, 2 La. Ann. R., 281, a suit for State and city bonds. In Tennessee, damages may be recovered in trover for the unlawful detention of a note, and the note itself may be recovered in detinue. Seals *vs.* Cummings, 8 Humphreys, 442.

‡ Supra, 478. Mercer *vs.* Jones, 8 Camp., 476, (1818).

§ Ingalls *vs.* Lord, 1 Cowen, 240.

It should, perhaps, be noticed, that, in this case, the defendant was a constable, who had illegally levied on the note in question; and the court said, "that it viewed with great jealousy the conduct of officers holding executions against defendants." I have already considered the question how far the character of the taking can come into consideration in this form of action. But the judgment was reversed by the plaintiff, on error, for the smallness of the damages.

| Alsager, Assignee, *vs.* Close, 10 Mees. & Wels., 576.

the conversion. The defendant cannot be less liable, for having destroyed the property to the amount of one half."

In an action of trover for certain *billetes*,\* being Peruvian paper money, it appeared that the billetes were at a great discount; but the matter being referred to the prothonotary for adjustment, the plaintiffs insisted, on affidavit, that the billetes were worth *to them* the value expressed on their face, and claimed a recovery to that amount. And the court allowed it. This, however, hardly seems in analogy to other cases; for the general rule which we have laid down is to be taken with the qualification, that the note, or other chose in action, is still an available security for the amount claimed.

Where† trover was brought for a £300 cheque, drawn by the bankrupt on his bankers, and delivered after his bankruptcy to the defendant, a creditor, and paid by the drawees, the jury found a verdict for the face of the bill. On a motion to set aside the verdict and enter a non-suit, Chambre, J., said, "How can you sue for a piece of paper of no value?" and Mansfield, C. J., said, "The plaintiffs proceed on the ground that the check is worth nothing, being drawn without authority; how can they recover on it the sum of three hundred pounds?" and a non-suit was entered.

The principle of these cases has been applied to securities of other description, as leases, and bonds not conditioned for the payment of money.

Where the defendant‡ agreed to purchase of the plaintiff for £73 19s. the unexpired term of a lease of twenty years, and the plaintiff delivered to him the indenture of lease for the purpose of having an assignment made out, the defendant subsequently made an agreement with the original landlord, and broke off the bargain with the plaintiff, and declined to accept an assignment. The plaintiff demanded the lease (but not the purchase money), which being refused, he brought trover. The jury found a verdict for £73 19s. the price agreed on as the value of the lease, deducting the amount of some fixtures which the plaintiff's under-tenant had removed, and no question was

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\* Delegal *vs.* Naylor, 7 Bing., 480.

† Mathew and Cousins, Assignees of Moore, *vs.* Sherwell, 2 Taunton, 439.

‡ Parry *vs.* Frame, 2 Bos. & Pull., 451.

made but the measure of damages was correct. So, where\* the defendant had executed a bond to one H. Clowes, which was assigned to the plaintiff, in the penalty of \$1,000, conditioned to convey a lot of land. Trover was brought for this instrument, and the conversion proved. The plaintiff having been nonsuited at the trial, on the ground that none but nominal damages could be given, the court set the non-suit aside, saying that the plaintiff, as the assignee of the obligee, having been entitled to the performance of the condition, the damages sustained would be the value of the land.†

Where an action of trover was brought‡ for a policy which it appeared was canceled, a verdict was recovered and sustained for 2*d.*, the value of the parchment only.

In Pennsylvania, it is held,§ that trover cannot be maintained for a chose in action, as a share of stock, but may for the paper or evidence of debt. And that in such case, the measure of damages is the debt of which the paper is the evidence.]

In the same State it is held, that the damages in this action are the value or current price of goods at the time of the demand, and the jury may give interest by way of farther damages.¶ And where the value is incapable of being ascertained with precision, as where it depends on the taste, fancy, or attachment of the owner, or on a contingency, the court will rarely disturb the verdict on the ground of excessiveness of damages. And the jury may go beyond the value, when there has been outrage in the taking, or vexation or oppression in the detention.\*\*

A stringent application of this form of action has been made to the fraud of an agent, who had represented to his principal

\* *Clowes vs. Hawley*, 12 J. R., 484.

† In *Towle vs. Lovet*, 6 Mass., 394, trover was brought for title deeds, but the quantum of damages was settled by consent.

In *Loosemore vs. Radford*, 9 Mees. & Wels., 657, Lord Abinger said, "the case resembles that of an action of trover for title deeds, where the jury may give the full value of the estate to which they belong, by way of damages; although they are generally reduced to 40*s.* on their being given up."

‡ *Wills vs. Wells*, 8 Taunt., 264.

§ *Sewall vs. Lancaster Bank*, 17 Serg. & R., 285.

¶ *Romig vs. Romig*, 2 Rawle, 241.

¶ *Jacobs vs. Laussat*, 6 S. & R., 350.

\*\* *Dennis vs. Barber*, 6 S. & R., 420. *Berry vs. Vantrees*, 12 S. & R., 89. *Harger vs. McMains*, 4 Watts, 418. *Taylor vs. Morgan*, 8 Watts, 338.

that he had effected an insurance, when in fact he had not. In trover for the policy, Lord Mansfield would not permit the defendant to contradict his own representation, and laid down the rule of damages as being the same as if the policy had been actually effected. "I shall consider," he said, "the defendant as the actual insurer, and therefore the plaintiff must prove his interest and loss."\* So, on the Pennsylvania circuit,† in an action of trover for a policy of insurance, by consent of parties the rule of damages was considered the same as if the suit had been on the policy.

Interest seems to be usually given by way of damages for the detention of the property. But whether the giving of interest is a rule of law or a matter left in the discretion of the jury, does not clearly appear. I infer the former. In trover for rum,‡ the Supreme Court of New York said, "the jury were competent to allow interest on the value of the chattel from the time of conversion, by way of damages."

So§ interest was allowed on a judgment in trover; and it was said that "in trover, interest is recoverable on the value of the goods from the time of the conversion." And|| in an action of trover for furniture, farming utensils, &c., the judge at the circuit told the jury "that *they might allow* interest by way of damages." But the Supreme Court said, on a motion for a new trial, "the plaintiff was *entitled* to interest by way of damages, from the time of the conversion." So also in Louisiana.¶ And in a case\*\* already cited, it was said, that "interest is *properly given* in trover, as well as the value of the property converted."†† And again,‡‡ the Court, per Cowen, J., said, "The action is trover, which goes for the actual value and interest."§§ In Connecticut also, the rule of damages in

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\* *Harding vs. Carter*, Park on Insurance, 4.

† *Kohne vs. The Insurance Co. of North America*, 1 Wash. C. C. R., 98.

‡ *Wilson vs. Conine*, 2 J. R., 280.

§ *Bissell vs. Hopkins*, 4 Cowen, 58.

|| *Hyde vs. Stone*, 7 Wend., 354.

¶ *New Orleans Draining Co. vs. De Lezardi*, 2 La. Ann. R., 281.

\*\* *Baker vs. Wheeler*, 8 Wend., 504.

†† See, also, *Dillenback vs. Jerome*, 7 Cowen, 294; *supra*, 479.

‡‡ *Stevens vs. Low*, 2 Hill, 188.

§§ In the note to *Mercer vs. Jones*, 8 Campb., 477, in the New York edition of these Reports (1821) it is said that "in Massachusetts it is the uniform rule to allow interest on the value of the chattel, from the time of the conversion until the trial."

In England this matter has recently been settled by statute; the 3 & 4 W. IV., c.

this action has been declared to be the value of the property converted, with interest from the time of the conversion.\*

In trover, as we have said, the conversion is the gist of the action; and it follows that the recovery of the property, or its re-possession by the plaintiff, only goes in mitigation of damages. And this is true, as well in regard to this action as in regard to that of trespass for personal property, as we shall have occasion hereafter to see. And on the same principle, if the property has been re-delivered to the plaintiff before suit brought, he can recover nothing but nominal damages. This is the original English rule, and has been also repeatedly held in this country.† The only modification that can be said to exist of this rule is, perhaps, in those cases where, intermediate the conversion and the return of the property claimed, special damage has been sustained by the plaintiff; and in such cases the special damage demanded must be distinctly alleged in the declaration.‡ Upon this general principle it has been held in Massachusetts, that where the property has been sold, and the proceeds applied to the payment of the plaintiff's debts, or otherwise to his use, the facts may be shown in mitigation of damages.§ So, if they are taken by an attaching creditor of the defendant out of the plaintiff's hands after he has promised to return them.||

Whether the defendant can go further and show that the property belonged to a third person, is more doubtful.

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42, § 29 (14th Aug., 1838), declaring that in all actions of trover "the jury on the trial of any issue, or on any inquisition of damages, may, *if they shall think fit*, give damages in the nature of interest, over and above the value of the goods at the time of the conversion." See *supra*, 479.

\* *Clark vs. Whitaker*, 19 Conn. R., 820.

† The language of the oldest authority on this point is as follows: "Si home prist mon cheval et ceo chevaucha et puis ceo redeliver al moy uncore jeo poie aver cest action vers luy: car ceo est un convercion, et le redelivery nest ascun barr del action mes solement serra un mitigacion de damages." 1 Roll. Abr., S. L. pl. I.

Baldwin *vs.* Cole, 6 Mod., 212. 5 Bac. Ab. Trover, D. § 39. Esp. N. P., 190-191. Cook *vs.* Hartle, 8 Car. & Payne, 568. So in *Murray vs. Barling*, 10 J. R., 172, Thompson, J., said, "It is every day's practice to sustain this action for the injury suffered, although the owner has re-possessioned himself of his property." And the same point was held in *Reynolds vs. Shuler*, 5 Cowen, 328.

The same has been held in Massachusetts, *Wheelock vs. Wheelwright*, 5 Mass., 104. *Gibbs vs. Chase*, 10 Mass., 124. *Greenfield Bk. vs. Leavitt*, 17 Pick., 1.

‡ *Moon vs. Raphael*, 2 Bing. N. C., 810.

§ *Pierce vs. Benjamin*, 14 Pick., 356.

|| *Kaly vs. Shed*, 10 Met., 817.

It has been said by very high American authority, "that in this action the defendant may disprove the plaintiff's title by showing a paramount title in a stranger."\* But it may well be doubted whether the doctrine can be maintained to the extent in which this language lays it down. In New York it has been held, that the defendant cannot set up property in a third person, without showing some claim, title, or interest in himself derived from such person;† and a plea of property in a third person has been held bad.‡ And in England it has been held in several cases, that where by his acts or acknowledgments the defendant had admitted the title to be in the plaintiff, he shall not be received afterwards to deny it.§

The plaintiff either in this action or in trespass, may sue separately for his aliquot share or proportion of interest in a chattel, and the defendant may give the joint interest of others in evidence, in mitigation of damages. If the plaintiff is a tenant in common, and the defendant wishes to avail himself of the plaintiff's omission to join his co-tenants in the suit, he may plead in abatement.¶ But even if he neglect to make such plea, he may still avail himself of the plaintiff's want of title to the whole property, for the purpose of reducing the damages.

Where¶ a creditor of the husband having taken in execution and sold trust-property of the wife, and the husband having purchased it at the sale for less than its value, in an action of trover brought by the trustee against the creditor, it was

\* Greenleaf on Evidence, 2, § 648. *Botan vs. Fletcher*, 15 J. R., 207.

† *Duncan vs. Speer*, 11 Wend., 64.

‡ *Hurst vs. Cook*, 19 Wend., 468.

§ *Hawes vs. Watson*, 2 Barn. & Cres., 541. *Goelling vs. Birnie*, 7 Bing., 889. *Stonard vs. Dunkin*, 2 Camp., 341. See on this point, also, *King vs. Richards*, 6 Whart., 418. *Ogle vs. Atkinson*, 5 Taunt., 759. *Lao vs. Towle*, 8 Esp. Cases, 114. *Kennedy vs. Strong*, 14 J. R., 128.

¶ *Nelthorpe vs. Dorrington*, 2 Lev., 118. *Brown vs. Hedges*, 1 Salk., 290. *Addison vs. Overrend*, 6 T. R., 766. *Sedgworth vs. Overrend*, 7 T. R., 279. *Heath vs. Hubbard*, 4 East, 110, 121. *Bloxam vs. Hubbard*, 5 East, 407 and 420. *Scott vs. Godwin*, 1 Bos. & Pull, 67-75. *Wheelwright vs. Depeyster*, 1 J. R., 471. *Chandler vs. Spear*, 23 Verm., 388.

In the King's Bench, in *Mountford vs. Gibson*, 4 East, 441 and 447, which was an action of trover, it was said that in trespass, payments made by an executor *de son tort* in due course of administration, should be recouped in damages. See, also, *Buller's N. P.*, 48.

¶ *Baldwin vs. Porter*, 12 Conn. Rep., 473.

held in Connecticut that proof of this matter was admissible in mitigation of damages.\*

In Tennessee, where a slave hired for general and common service is employed in any hazardous business without the consent of the owner, it is a conversion, and the hirer is liable for the value ; or, if the owner do not choose to consider it a conversion, he is liable in damages for any injury the slave received while engaged in such business.†

As has been already noticed, some confusion appears to have been introduced into the rule of damages in this action, owing to the different aspects in which the suit is brought ; it being sometimes analogous to an action in an ordinary case of contract, as to test a right of lien, and sometimes in the nature of a suit to redress a wilful trespass.‡

An effort might be made to render the rule of damages in trover and trespass identical without reference to the form of the remedy resorted to, and dependent only on the character of the defendant's act. But as the law at present stands, there seems no warrant for a distinction between tortious conversions and bona fide takings, except so far as the malice goes to prove a conversion. If that fact be established, the character of the taking is put out of view. It seems, however, that were the thing to be settled on principle, the rule might be thus laid down :

Where the original conversion is wholly unaccompanied by malice, in other words, where it is not wilful, the rule of damages is a pure question of law, on which the jury is to be controlled by the court. In these cases, the jury should be directed to give the value at the time of conversion, with interest, unless the plaintiff has been deprived of some particular use of the property of which the defendant had knowledge ; in that case, if such use would have increased its value to the plaintiff, the jury should give the highest value of the chattel at any time between the conversion and the trial, with interest from

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\* But in Alabama, where a sheriff seized the property of the plaintiff, and sold it under execution against H., and by direction of H. paid over the surplus after satisfying the executors, to G. (the plaintiff), or his agent ; it was held that the surplus thus paid over could not go in reduction of damages. *Locke vs. Garrett*, 16 Ala., 698.

† *Mullen vs. Enaley*, 8 Humphreys, 428.

‡ Whenever trespass for taking goods will lie, that is, where they are taken wrongfully, trover will also lie ; for one may qualify, but not increase, a tort. 2 Saunders, 47, *k*.

such time, *i. e.*, the time of highest value, by way of damages for the detention. But even this, it is apparent, is a very feeble protection for property which has no market price or commercial value, and where, from the necessity of the case, the jury must be left to a large discretion.

If the property converted be a chose in action, as a bill or note, or the security for the payment of money, the measure of damages is *prima facie* the face of the bill or note. If the instrument or security sued for be not for the payment of money, but a contract for the transfer of property or the performance of some act, then the value of the property or of the act will furnish the rule of damages.

If the taking be willful, more difficulty presents itself. We have seen that where the chattel was altered and increased in value, damages have been given in some cases to the full value of the increased article, on the ground that the taking was *mala fide*. If this be right, then it ought always to be competent for the plaintiff to show malice on the part of the defendant, to aggravate the damages. But this would be irreconcilable with the numerous cases\* which hold that the conversion is the gist of the action, and the taking immaterial.

The true rule would appear to be, to make the measure of damages depend not on the form, but upon the nature of the action; and where trover is brought, as a substitute for trespass, to make the rule of damages correspond.

If this were so, then if the conversion were willful the measure of damages would be as above laid down, with the exception that they might be increased in the discretion of the jury for the malicious act.

If the property had been altered and increased in value, the rule would again depend on the character of the conversion. If that were willful, then the value of the articles so increased would be the rule. But this should never be, where the act was *bona fide*; and in such case, the true rule would be to allow the defendant for whatever value his labor had actually conferred on the property.

It would not be proper to leave this subject without noticing the question how far the recovery of a judgment in trover vests

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\* *Wilbraham vs. Snow, 2 Saunders, 47.*



the property in the defendant. If the plaintiff recovers the value of the property, and the judgment is satisfied, there would seem to be no doubt that the title to the property should and does vest in the defendant, he having paid its value.\* But how far this transfer of title depends on the judgment, and how far on its satisfaction, seems by no means clear; and the better opinion would appear to be that if the judgment is not for the value of the property, or if it remain unpaid, the title is unaltered.†

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\* *Morris vs. Robinson*, 8 B. & C., 196.

† So in Indiana, a recovery of nominal damages does not divest the plaintiff's title. *Barb vs. Fish*, 8 Blackf., 481, where the cases are well reviewed. See *Cooper vs. Shepherd*, 8 Man. Gr. & Scott, 266. In New York, see *Osterhout vs. Roberts*, 8 Cowen, 48. *Betts vs. Lee*, 5 J. R., 848. 2 Kent Com., 888, note c., 5th edition.

## CHAPTER XX.

### THE RULE OF DAMAGES IN ACTIONS BROUGHT FOR THE RECOVERY OF SPECIFIC PERSONAL PROPERTY; DETINUE AND REPLEVIN.

**Detinue**—Nature of the proceeding of Replevin—In this action damages can be recovered by both parties—Where the defendant succeeds, he is entitled to interest upon the value of the property during its detention—How the value is to be estimated—Damages recoverable by the plaintiff.

Two forms of action are prescribed by the common law for the recovery of specific personal property, detinue and replevin; the first being generally used where there was a tortious detention only, the latter where there was a tortious taking.

And in detinue, as in debt, no damages were generally given for the thing itself, that being recoverable in specie; but merely for its detention. If, however, the property was not finally returned, then damages might be given for its value.\* “The action of detinue,” says the Supreme Court of Tennessee, “is for the thing detained and damages for detention; the value of the property is ascertained by the jury; and the judgment is in the alternative for the sum so found, as the value in case the thing recovered cannot be had.”†

The question on the issue of *non detinet* is whether the chattel be detained, and if so, what is its value and what the damages for its detention; and so the ordinary modern form of verdict in detinue finds the value of the property and damages for its detention.

But as has been said, if for any reason the property cannot be returned, the plaintiff is entitled to its full value. So in the early cases, where we often find detinue brought for charters or

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\* Sayer on Damages, ch. xiv., 69 and 70.

† Wade vs. Dolby, 8 Humphreys, 406.

title deeds, if the charters were destroyed or made way with, (eloigned) the plaintiff recovered all in damages. And so in a recent case where detinue was brought for stock certificates, which had been returned *pendente lite*, it was held that the jury might confine themselves to an assessment of damages.\* In this case the property was demanded; the stock was worth £3 5s.; when it was delivered it had fallen to £1, and the plaintiff was held entitled to recover the difference.

A plaintiff in detinue, whose title to the property sued for is legally divested before the trial of the cause, can recover nothing beyond his damages for its detention to the time when his title was divested, and the costs of suit.†

The action of detinue has, however, fallen into great disuse, and in some of the States of the Union it is abolished by statute.‡ I proceed, therefore, to the action of replevin. And this action, also, has been so much altered and modified by special statutes, that it will only be proper here to treat of it very succinctly. As to the character of this action, it is sufficient to state, generally, that the plaintiff by his writ seizes the specific property, and at the same time gives a bond with proper sureties, conditioned to return it, or its value, provided it shall finally appear that he has no right of action. The bond, however, is only a cumulative security to the defendant; and if the plaintiff fails to establish his right, the court may proceed in the action itself to award damages against him, as the result of a claim declared to be unfounded, for the value of the property taken by him.

The nature of the proceeding is well and briefly stated by Parsons, C. J. :

“ The plaintiff having by the service of the writ obtained the possession of the goods replevied, prosecutes it to obtain judgment for damages and costs against the defendant for the caption and detention. These are the objects of his suit. The defendant not only resists the plaintiff's claim, but he also complains of an injury arising from the service of the writ. He demands back the chattels, with damages, occasioned by the replevin, and his costs in the defense. \* \* \* The distinction between replevin and other actions in which

\* *Williams vs. Archer*, 5 Mann. Gr. & Sc., 318. See *Archer vs. Williams*, 2 Car. & Kir., 28.

† *Cole vs. Conolly*, 16 Ala., 271.

‡ So in New York, by Revised Statutes, Vol. II., 558.

the plaintiff demands a debt or damages or lands, is very clear, because the magnitude of the debt or damages, and the quantity of the land, is involved in the plaintiff's original demand, as well as his title to recover any thing. But in replevin, the demand of the defendant is founded on the legal process sued and prosecuted by the plaintiff.\*\*

The jury must find the value of the property, and in Arkansas, in replevin for slaves where the property has not been replevied and delivered to the plaintiff, and the verdict is in his favor, the jury should find the separate value of each slave, or a *venire de novo* will be awarded.†

In this action the plaintiff had damages at common law, and costs, by the statute of Gloucester, as a consequence of such damage; but the avowant or defendant in replevin had no costs, although in many cases where an avowry or conusance was made, and a return prayed, the defendant was an actor.‡ In consequence of this hardship two statutes were passed§ giving damage and costs to the defendant as the plaintiff would have had at common law.¶ These statutes have, I believe, been generally reenacted in this country. By virtue of these enactments, the general rule, where the defendant succeeds and has judgment in his favor, for a return, is that he is also entitled to damages; and the decrease in value of the goods since the time of the replevin, with interest on their entire value, forms the proper measure of his damages.¶ So the defendant is entitled to damages for deterioration in the value of the goods from the time of the replevin, although it be not pretended that the decrease in value be attributable in any degree to the act or default of the plaintiff. In a case in New York, it was decided in a suit on the replevin bond that the non-return of the property was excused by its inevitable destruction before judgment.\*\* This decision was based on the old rule that if the condition of a bond become impossible by the act of God, the penalty is saved.††

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\* Bruce vs. Learned, 4 Mass., 614, 617 and 618.

† Noland vs. Leech, 5 English, 504.

‡ Bacon Abr., Costs, F., of Costs in Replevin.

§ 7 Hen. VIII., cap. 4; and 21 Hen. VIII., cap. 19.

¶ James vs. Tutney, Cro. Car., 383, Case 582. Rowley vs. Gibbs, 14 J. R., 385  
Caldwell vs. West, 1 Zabriskie, 411.

¶ Rowley vs. Gibbs, 14 J. R., 385. Brimsee vs. Maybes, 21 Wend., 144.

\*\* Carpenter vs. Stevens, 12 Wend., 589.

†† Black. Com., B. 2, Ch. 20.

But it seems contrary to principle and has been expressly disapproved of.\* As between parties to a contract, it seems very reasonable that all interested in its execution should bow to the superior power which renders its performance impossible. But it cannot be tolerated that a wrongdoer should be excused by any subsequent accident. Nor do the analogies of the law justify any such decision. In trover or trespass for goods after the conversion or trespass was complete, the party in fault would certainly never be admitted to excuse himself by alleging that the property had perished in his hands without his fault. The court appears rather to have looked to the technical form of the action than to the substantial justice of the case.

In an action of debt on a replevin bond, in Massachusetts, the original plaintiffs having been defeated, but refusing to restore the goods on the writ of restitution, the question was considered, whether the value of the goods should be computed at the valuation in the replevin bond; the actual value of the property at the time of the service of the replevin writ; at the time of the verdict rendered; or at the time of the demand made under the writ of restitution: it seems from the report that the property at the time was still in the possession of the defendant; and the latter was held the true rule.†

In the same State, also, interest is allowed the defendant on the value.‡ But where the goods attached were subject to duties, and the plaintiff paid them, it was held in an action on the replevin bond, that the interest should be computed only on the difference between the amount so paid, and the valuation in the writ of replevin.§ This is a correct application of the original doctrine of recoupment.

It appears here, that the valuation in the original writ was adopted, instead of the actual value of the goods; and it has been also so held in England, on the sound principle, that the plaintiff in the replevin suit is bound by the estimate of the property made by himself.||

It has been further intimated, in the same State, that if

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\* *Suydam vs. Jenkins*, 8 Sandford Sup. Ct. R., 614.

† *Swift vs. Barnes*, 16 Pick., 194. See this case commented on in *Suydam vs. Jenkins*, 8 Sandford S. C. R., 614. In Maine, see *Howe vs. Handley*, 28 Maine R., 241.

‡ *Wood vs. Braynard*, 9 Pick., 322.

§ *Huggeford vs. Ford*, 11 Pick., 223. See, also, *Mattoon vs. Pearce*, 12 Mass., 406.

|| *Middleton vs. Bryan*, 3 Maule & Sel., 155.

special damage was shown to have been suffered by the defendant, it may be allowed.\*

These damages are, it will be observed, only damages for the *detention* of the property, and apply to cases where the property has not altered in value or has deteriorated. But where the property has risen during the pendency of the proceedings, another principle is applied. Under the judgment for a return, the defendant is entitled to recover the value of the property; and here the same question arises, although it is sometimes presented in a distinct suit on the replevin bond, which we have already examined in the action of trover, as to the time when the value should be computed; whether at the time of the replevin, or the highest price down to the time of trial. It has been suggested in New York† that the former period is to furnish the rule. But this must, I think, be taken with many modifications, and as we have already seen has been distinctly disapproved of in the same State.‡

So this rule in regard to the value of the property is also modified where the defendant has only a special property in it; for if the value exceed his demand, and he takes a verdict for the entire value, he will be liable to the plaintiff for the excess.§

And on the same principle, if property be replevied from a sheriff holding it under execution, and who has no other interest in it than that of the creditor whom he represents, if the issue be found for the defendant and the value of the property be greater than the amount of the execution, the rule of damages is the amount of the execution with interest and the costs thereon; but if the value of the property be less than the execution, then the rule of damages is the full value of the property.¶ It will be observed that the analogy of trover is here followed; for in that form of action if the plaintiff claims by virtue of a lien, he recovers only to the extent of his lien, provided always that the action is not against a mere stranger.

In New York and Pennsylvania, it has been declared, that if the writ be sued out fraudulently, vexatiously, or maliciously,

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\* *Barnes vs. Bartlett*, 15 Pick., 71.

† *Brizze vs. Maybee*, 21 Wend., 144.

‡ *Suydam vs. Jenkins*, 8 Sandf. S. C. R., 614.

§ *Scrugham vs. Carter*, 12 Wend., 181.

¶ *Jennings vs. Johnson*, 17 Ohio, 154.

or the defendant's proceedings be of the same character, the jury may give exemplary damages against either plaintiff or defendant, as in cases of willful trespass.\*

And on the other hand, it is competent for the plaintiff to show in mitigation that shortly after the delivery of the property to him, the defendants repossessed themselves of the greater part of it;† the Supreme Court of New York saying, that the action being in many cases a substitute for trespass *de bonis asportatis*, the rule of mitigation in that action was strictly applicable.

And, so in Iowa and Maryland it has been decided that the plaintiff, though non-suited, may still offer testimony to prove ownership of property in himself, upon inquiry into the right of the defendant's possession, in order to show that the defendant would have sustained no substantial damage as he was not the owner of the property.‡

Thus much of the defendant. As to the damages recoverable by the plaintiff, they are for the detention of the property, of which interest on its value is ordinarily the measure. He is also entitled to compensation for any deterioration in value of the goods replevied while they were in the hands of the defendant;§ but the plaintiff who retains the articles replevied till judgment in the suit, cannot, if he succeed, claim damages for the depreciation in their value, because he may always convert them into money.]

It has been held in the analogous action of case for taking personal property, that the plaintiff was entitled to recover for his time and expenses incurred in pursuit of the property,¶ and in Maryland for the hire of slaves.\*\* In Texas it has been said,

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\* *Cable vs. Dakin*, 20 Wend., 172. *Donald vs. Seafie*, 11 Penn. R., 331. *Brizoe vs. Maybee*, 21 Wend., 144.

† *Dewitt vs. Morris*, 18 Wend., 496.

‡ *Harman vs. Goodrich*, 1 Iowa., 18. *Bell vs. Worthington*, 8 Gill & Johnson, 247. In Indiana, when the replevin bond is forfeited, the statute authorizes the defendant (in replevin) to recover, in a suit on the bond, such sum as shall be just and equitable; and if the plaintiff recover, he shall in like manner recover damages for the detention of the goods and chattels. An effort was made under this statute to obtain for the defendant in replevin, an allowance for his counsel fees and time lost in attendance on court in the replevin suit, but it was denied. *Davis vs. Crow*, 7 Blackf., 129.

§ *Rowley vs. Gibbs*, 14 J. R., 385.

|| *Gordon vs. Jenney*, 16 Mass., 465.

¶ *Bennett vs. Lockwood*, 20 Wend., 223. *Morris on Replevin*, 139.

\*\* *Dorney vs. Gassaway*, 2 Har. & J., 413.

"That where the suit is brought to recover the specific property and damages for its detention, if the property sued for be a slave, damages for the hire should be computed from the time of the demand to the rendition of the judgment; if no special demand is proven, the service of the writ is the time from which the damages should be computed."\* Where the plaintiff has but a life interest, as in slaves, the verdict cannot be for more than the value of such interest.†

It is the peculiarity of this action, that both parties may be actors, and so if it is found that a part of the property claimed is the plaintiff's and a part not, both plaintiff and defendant may recover damages against each other.‡

As to mitigation of the plaintiff's damages, it has been held that in a suit on the replevin bond the defendant may show that the plaintiff had no title to the property, on the ground that the decision of the replevin suit might not be necessarily conclusive upon that question.§

The subject of this chapter is, as I have said, very much under the control of special statutes; and where those statutes, or the decisions founded on them, do not apply, a reasonable rule may generally be deduced from the analogous cases decided upon the actions of trover, trespass *de bonis asportatis*, case for injury to personal property, and on sales of chattels.]

In Louisiana, proceeding by sequestration is strongly analogous to the replevin or attachment of the common law, and the party plaintiff gives a bond with sureties, "to pay all damages that may accrue in case it shall appear the sequestration was wrongfully sued out." In a suit on such a bond it has been decided in that State that the judgment in the original sequestration proceeding is conclusive of the question of property against the sureties to the sequestration bond, and that the counsel fees of the first suit can be recovered on such bond,

\* *Robbins Adm'r vs. Walters*, 2 Texas R., 180.

† *Lloyd vs. Goodwin*, 12 Smede & M., 223.

‡ *Powell vs. Hinsdale*, 5 Mass., 343.

§ *Wallace vs. Clark*, 7 Blackf., 298.

] The sureties in a replevin bond are together liable only to the amount of the penalty in the bond, and the costs of the suit upon the bond. *Hefford vs. Alger*, 1 Taunt., 217.

In Kentucky, a plea in replevin alleging property in a stranger is good. *Scott vs. Hughes*, 9 B. Monroe, 104.



nor is it material to show that such fees have been actually paid; it is enough that the plaintiff has incurred a liability for them.\*

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\* *Jones vs. Doles*, 8 La. Ann. R., 588.

## CHAPTER XXI.

### THE MEASURE OF DAMAGES IN ACTIONS OF CASE AND TRESPASS—SUITS AGAINST SHERIFFS AND OTHER PUBLIC OFFICERS; AND AGAINST THEIR SURETIES.

In actions of Case or Trespass, against Public Officers, the Rule of Damages is usually a question of law—The general Rule is the injury actually sustained by the plaintiff—On whom does the proof of damage rest?—Cases examined—In America, the debt due the plaintiff is *prima facie* the Measure of Damages—If aggravation is shown, the jury may give exemplary Damages—Mitigation—Suits against Collectors of Customs—Suits against Sureties of Public Officers.

HAVING disposed of the actions of trover and replevin, we now approach the great head of *Case*, of which assumpsit is only a branch, and some other subdivisions of which we have already considered. I shall, adhering to the line of demarkation already adopted, treat first of those applications of the action, where no circumstances of aggravation are relied on; reserving for our ultimate consideration those where the evil motive of the defendant forms a substantial ground of complaint. We have already\* had occasion to notice, that in actions against private agents the law affords two remedies, one, *ex contractu*, upon the contract, and the other, *ex delicto*, for the violation of duty; but, that in both these cases, the measure of relief is a question under the entire control of the court, unless where the latter proceeding is adopted, and circumstances of aggravation are proved. We shall find the same general principle to hold good in regard to the actions which we are now about to consider.

We have also, when discussing the subject of remote and consequential damages, had occasion to notice the distinction between trespass and case; the former being originally

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\* *Supra*, 846.

used where the injury was direct, the latter where consequential. But the line of division between case and trespass is often so faint and difficult of delineation, that it will be better for our present purpose to consider rather the object of the suit than the form of the action.\* Before examining the subject of trespasses or wrongs generally, we will consider that class of cases which arise out of the acts of the public officers who are charged with the ministerial portion of the administration of justice.

It is well settled under the English system, that sheriffs and other ministerial officers, in case of neglect or violation of duty, are responsible to the party aggrieved in a civil action. The mode prescribed is usually one of the great class of actions on the case; but the proceeding often takes the form of trespass.

To this general remedy, which flows from the principles of the common law, is frequently superadded some special statutory relief, enforced by some particular penalty; but the addition of such particular remedy does not interfere in any way with the right of the party to his compensation for the actual injury done in a suit of trespass, or on the case.

The ordinary cases in which the questions arise which we are now about to examine, are presented in suits against sheriffs, or other ministerial officers, either for negligence, as the escape of parties arrested on mesne or final process, for taking insufficient security, for neglect to seize or to preserve property on execution; or omission to make a true return to the writ; or on the other hand, for an excess of their powers, as for levying upon property which they are not authorized to by the process, excessive distress, &c. And in these cases we shall find the general principle to be, although the form of the action be in tort, that the party aggrieved is entitled, independent of any statutory relief, to recover only to the extent of his actual injury.

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\* As a general principle, it is well settled in regard to all public officers, that although created by statute, and although liable to the infliction of penalties for violation of official duty, they are still equally responsible to the aggrieved party, in an action on the case. "Where the law," says the Supreme Court of Maine, "has affixed forfeitures for the infractions thereof, or for neglect in not conforming to its requirements, whereby individuals are injured, they are not in consequence thereof deprived of the remedy which would exist if no penalties were prescribed." *Hayes vs. Porter*, 22 Maine R., 371. *Beckford vs. Hood*, 7 T. R., 620. *Farmer's Turnpike Co., vs. Coventry*, 10 Johns. R., 389.

"It is not correct, however," says the Supreme Court of Vermont, "that in actions of trespass for personal property, when the defendant is an officer acting under legal process, no damages can in any case be recovered beyond the actual value of the property. Courts usually in such cases instruct the jury that they ought to confine themselves within those limits. But circumstances may require a departure from it."\*

The rule is, indeed, subject to many modifications; partly arising from the vagueness that we have often had occasion to notice in the early cases;† partly from the variety of the forms of action employed; and partly from the application of the rules of evidence; and partly from the general principle that in actions of tort, the intent, disposition and conduct of the defendant always bears largely on the question of damages.‡ And these various questions we shall better understand by an examination of the cases.

As a general rule, however, it is settled, as I have said, that the measure of damages in suits of this class brought against a public officer by a creditor plaintiff, whose remedy against his debtor has been impaired by the neglect or other misconduct of the officer, is the actual injury sustained, this actual injury being measured by the amount of the original debt due

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\* *Joyce vs. Barney*, 20 Verm., 154.

† *Ravenscroft vs. Eyles*, Warden of the Fleet, is very strong to show the power which the courts originally gave in these cases to the jury, 2 Wils., 295 (1766). It was case for a voluntary escape, and the question being whether the action lay, the debtor having returned to custody before suit brought, and judgment having been recovered against him, Lord Ch. J. Wilmot, said: "The quantum of damages is nothing to the purpose; for if the jury had power in this case to give damages, we must now take it that they have done right; and I am of opinion that the jury were not confined to give the exact damages in the final judgment, but had a power and discretion to assess what damages they thought proper; for this being an action upon the case, the damages were totally uncertain and at large."

In *Sayer on damages*, 58, this case is stated to have been tried before Lord Camden, C. J.; that it was proved at the trial, that the debt was *operate*; and that on the argument Bathurst, J., said, "whether the debt was *operate* or not, I take it to be a settled point, if the escape is a voluntary one, that it is the duty of the jury to assess damages to the amount of the whole debt." But by the report in 2 Wilson, above cited, no such point was made before the court on the subject of damages.

In *Kent vs. Kellway*, case for rescue from arrest (Lane, 70; *Sayer on Damages*, 55), it is said that damages *may be* recovered to the amount of the debt for which the arrest was.

‡ In *Bayley vs. Bates*, 8 J. R., 185, the Supreme Court of New York said, "an action for a false return sounds in tort and fraud, and it draws into consideration in a greater or less degree, the *quo animo* of the defendant."

the plaintiff or the value of the property, and which has been lost or prejudiced by the neglect of the officer.

The original debt is of course the gist of the action, and it is perfectly well settled, that the existence of such debt must be proved by the plaintiff.\* But if that fact is established, the equally important inquiry remains, whether the recovery of the debt has been prejudiced by the acts of the defendant. In other words, whether under any circumstances it could have been collected of the defendant's property. The question sometimes arises on mesne, and sometimes on final process.

In England, a remedy was originally given by statute, in an action of debt against the sheriff for the escape of prisoners charged in execution; and this statute has been reenacted to some extent in this country. But under it no question could arise as to the measure of damages; for, the action being debt and the provisions of the statute being peremptory, the officer was charged with the whole amount of the plaintiff's original claim, as ascertained by his judgment. Our present inquiry is directed to the measure of damages in the action on the case, or in trespass.† And the only remedy that now exists in England against a sheriff for an escape on final process, is an action on the case for such damages as the plaintiff may have sustained by reason of such escape.‡

When a prisoner for debt makes an escape,§ (says Lord Kaims,) "the creditor is hurt in his interest, but sustains no actual damage; for it is not certain that he could have recovered his money by detaining the debtor in prison, and it is possible he may yet recover it, notwithstanding the escape. But it is undoubtedly a hurt or prejudice to be deprived of his expecta-

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\* *Gunter vs. Cleyton*, 2 Lev., 85. *Alexander vs. Macaulay*, 4 T. R., 611.

† *Bonafous vs. Walker*, 2 T. R., 126. *Rawson vs. Dole*, 2 J. R., 454. No distinction exists in New York as to mesne process, the statute giving the remedy against the sheriff for an escape, expressly declaring that the "sheriff shall be answerable in an action of trespass on the case to the extent of the damages sustained by the party at whose suit the prisoner shall have been committed." 2 R. S., 487, § 62. As to the final process, however, if an escape takes place, the sheriff is still liable for the debt. § 68. But the distinction of actions is destroyed by the code of procedure. In Massachusetts, by Rev. Stat., c. 97, § 71, the action of debt for escape has been abolished. *West vs. Rice*, 9 Met., 564.

‡ 5 & 6 Vict., c. 98, § 81. *Arden vs. Goodacre*, 15 Jur., 776.

§ Prin. of Equity, Book I., Ch. IV., § V., Ed. of 1767, 159.

tion to obtain payment by the imprisonment ; and the common law gives reparation by making the negligent jailor liable for the debt, precisely as equity doth in similar cases. A messenger who neglects to put a caption in execution, affords another instance of the same kind."

This appears, Lord Kaimes observes, to be the infliction of uncertain consequential damage. However, our law proceeds on a principle of evidence, throws the burden of proof on the negligent party, and assumes that the plaintiff is injured until the contrary appear. It might be urged that this should not be so, where there is mere ordinary negligence, unaccompanied by any criminal intention ; but as with common carriers, so with public officers, there are reasons of controlling weight, why the party to whom a great trust is confided, and in whose hands usually all the testimony must be, should be compelled to exculpate himself after a *prima facie* case of negligence is made out against him. There appears, however, to be a discrepancy on this point between the English and American rule. In England, it would seem, though it is by no means clear, that the plaintiff must show affirmatively that he could have collected his debt but for the negligence of the defendant ; while in this country, it appears to be settled that the plaintiff, after proving his debt against the prisoner, the custody and escape, is entitled to recover as his damages the amount of his debt, unless the officer can show that the defendant was insolvent, or in any other way prove that the plaintiff has sustained no actual loss. "The body," says Mr. J. Cowen,\* "is considered the highest satisfaction in the law ; that is for the time gone by the sheriff's negligence, and it is doing no violence to say, that a defendant who would escape had *prima facie* secreted himself, or otherwise placed himself and property beyond the reach of execution."

It would seem, on the general principles which we have already considered, that even if it affirmatively appear that the plaintiff has sustained no damage, the officer guilty of a technical violation of duty would still be liable for nominal damages.† And in case for not executing a *ca-sa*, the jury found

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\* Patterson vs. Westervelt, 17 Wend., 543 and 548.

† Supra, Ch. II., 52 and 58.

It may be useful to collect here some conflicting authorities on this point. In an

that the sheriff was in default, but that the plaintiff had sustained no damage; and a verdict was entered for the defendant. But on argument, verdict was entered for the plaintiff, with nominal damages; Lord Denman saying, "When the clear right of a party is invaded in consequence of another's breach of duty, he must be entitled to an action against that party for some amount. There is no authority to the contrary."\* So in

early case, where the sheriffs of Norwich sued the defendant, who had escaped by a rescue, on the ground of their liability over to I. S., at whose suit they arrested him, it was objected that the plaintiffs had not shown that they were charged, or in any way damaged; but the objection was held ill. *Sheriffs of Norwich vs. Bradshaw*, Cro. Eliz., 58.

In *Crompton vs. Ward*, 1 Str., 429, 426, it is said, "that the plaintiff has an interest, a sort of property in the body of the prisoner, and sustains a damage by a rescue." But *what* damage is not said.

In *Powell vs. Hord*, 1 Strange, 650, an action for a false return on meane process, the court held, "that if the defendant were a man of estate, and could still be taken, and so no damage, they should think the debt too much to give; but that *not being this case*," the jury found the whole debt as damages, with the opinion of the Chief Justice.

And so, again, in *Planck vs. Anderson*, 5 T. R., 37, it was held that the sheriff is not liable to an action for an escape on meane process, if the jury find that the plaintiff has not been delayed or prejudiced in his suit.

And in *Beckford vs. Montague*, 2 Esp., 476, case for a false return of meane process, the original defendant being still within the reach of process, Lord Kenyon told the jury that they were not called on to give the plaintiff the whole extent of the debt, if the original debtor was still solvent. See, also, *White vs. Jones*, 5 Esp., 160.

In *Barker vs. Green*, 2 Bing., 317, case for not arresting J. W., it was held that though the plaintiff had sustained no actual damage, it was still a case for nominal damages, and the court refused to enter a non-suit.

But in *Williams vs. Mostyn*, 4 Mees. & Wels., 145, where case was brought for the voluntary escape of one Langford, taken on meane process, and *it was admitted* that the plaintiff had sustained no *actual damage or delay*, the defendant having returned to the custody of the plaintiff, a verdict was found for the plaintiff with *nominal damages*. And on motion the court directed a *non-suit* to be entered, saying "that there had been *no damage in fact or law*;" and they disapproved of the case last cited.—*Barker vs. Green*.

In *Bales vs. Wingfield*, 4 Q. B., 580, where case was brought against the sheriff for neglecting to sell under a *f. fa.*, the writ was delivered to the sheriff, who seized on the 24th, and advertised a sale for the 6th of May: he did not, in fact, sell till the 27th. On the 15th May a fiat in bankruptcy issued, and so the sheriff returned "no goods." The Q. B. held that it lay on the plaintiff to show damage; and a verdict for nominal damages being entered, they refused to set it aside. S. C., *Nev. & Man.*, 881.

But in *Wylie vs. Birch*, 4 Q. B., 566, case for a false return, Lord Denman, C. J., assumed the principle that the action could not be maintained against the sheriff for breach of duty unless damage accrued thereby to the plaintiff, and cited the above cases; but said, also, that the breach of duty afforded presumption of some damage to the party who sets the sheriff in motion; and in such a case it seems still in England that if the plaintiff offered no proof of actual injury, he would be entitled to nominal damages.

\* *Clifton vs. Hooper*, 6 Q. B. R., 468, a distinction was pointed out between meane and final process, to which it may be proper to advert.

Vermont, if the sheriff neglect to return an execution, although no injury appear to have resulted, judgment will still be given for nominal damages.\* So in a case already cited in Massachusetts, against a sheriff for neglecting to return an execution, the Supreme Court of that State said, "The plaintiff is entitled to nominal damages for the officer's neglect. No actual damages are proved, but where there is neglect of duty the law presumes damages.† But in Vermont, in an action brought against an officer who had attached the plaintiff's goods, it has recently been said, "That no case can be found where damages have been given for trespass to *personal property*, where no unlawful intent nor disturbance of a right or possession is shown, and where not only all *probable* but all *possible* damage is expressly disproved."‡ And this certainly ought to be the rule.

The more important question is, however, where the breach of duty is clear, on whom does the proof of damage rest? Is the plaintiff to prove that he is damnified, or is the officer to disprove the fact?

The earliest case on this subject,§ runs thus: "An action upon the case against a sheriff, upon an escape suffered by his bailly upon a mesne process, and it was in evidence, as is necessary to make this case, that there was such a debt, that such a process and warrant was, and a due debt, and lastly, that the party arrested was become insolvent; otherwise he should not have recovered damages to the value of his debt, as he here did upon all this, proved in evidence as aforesaid."

On the authority of this case, Mr. Peake|| lays down the rule thus: "In order to show the amount of damages he has sustained, the plaintiff should also prove the circumstances of the defendant at the time of the arrest, and that he has since absconded, or become insolvent; for if the defendant were originally in bad circumstances, or he may be met with every day, and the plaintiff has not in fact been injured by the negli-

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\* Kidder vs. Barker, 18 Verm., 454.

† Laffin vs. Willard, 16 Pick., 64. See, also, Goodnow vs. Willard, 5 Met., 517.

‡ Paul vs. Slason, 22 Verm., 281. Supra, 58.

§ Tempest vs. Linley, Clayton, 84.

|| Norris's Peake, 608.



gence of the defendant, the damages will be merely nominal." Mr. Starkie briefly says,\* "The plaintiff must prove his debt and the damages which he has sustained from the sheriff's negligence."

In England, the Court of Common Pleas recently said, that they had not been able to find any decision in which the rule as to the measure of damages was clearly defined. The principal case was one in which it was endeavored to reduce the liability of the sheriff by showing, where an escape from final process had taken place, that the plaintiff might, by diligence, have re-arrested or detained the defendant and recovered his debt. But this was denied; and it was declared that the true measure of damages is the value of the custody of the debtor at the moment of the escape; that if at the time of the escape the debtor had not the means of satisfying the judgment, the plaintiff loses only the security of the debtor's body, and the damage may be small. If, on the other hand, at the time of the escape, the debtor could pay, and has wasted his means since then, it being clear that the loss of the debt is owing to the sheriff's neglect, the jury would be justified in giving the full amount of the execution.†

But it is plain that this still leaves the whole subject at very loose ends. What is meant by the value of the security of the body of a debtor who cannot pay? Are his physical and mental qualifications to be gone into, and the chance of his subsequently acquiring property, to be estimated? Are the chances of his friends being induced or coerced, by reason of his imprisonment, into paying the debt, to be inquired of? Again, what can be more vague than in a matter of this kind, to say that "*the damages may be small.*" Nor on the other hand, even if the debtor is solvent, is the liability of the sheriff to pay the debt declared as matter of law. It is simply said that the jury would be "*justified in giving the full amount of the execution.*" And the question on whom the burden of proof as to the debtor's pecuniary condition falls, is not alluded to. It is plain that the whole subject in England is in a state of perplexing uncertainty.

We turn now to the American cases.

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\* Evidence—Sheriff—Escape. Vol. 2, 1016.

† Arden vs. Goodacre, 20 Law J. Rep. (N. S.) C. P., 184; 15 Jur., 776.

In an early case in New York,\* the facts were these. One Briggs had been master of the schooner *Friendship*, and had signed bills of lading for goods shipped at New York by Potter, the plaintiff, for account and risk of a West India house, to the amount of £1,655 9s. 3d. South Carolina currency. He also owed the plaintiff a balance of £129 11s. 3d. Briggs ran away with the goods and never delivered them. Potter sued Briggs, and he was arrested on a *capias ad respondendum*, and after being in prison some time, escaped by the assistance of his friends. The sheriff made a special return to the writ, of a rescue: the plaintiff sued the sheriff in case, for the escape and false return.

It appeared on the trial that Briggs was very poor, and had no means of subsistence; and the defendant offered to prove that the plaintiff's attorney, after the escape, admitted Briggs "to be not worth a cent." This, however, was excluded. The judge charged that the facts did not justify the sheriff's return of a rescue; that the plaintiff had established a right of action, as well for the value of the goods shipped as for the balance of account, but that the jury were to decide the damages under all the circumstances; that the poverty of Briggs might be considered in mitigation, and if the return of the sheriff was fraudulently made, it would be an aggravation of damages. The jury, taking into consideration both the amount of the invoice and the balance of the account, found for the plaintiff \$3,000, which (as appears by the opinion of Livingston, J.) was about half the plaintiff's demand against Briggs. On motion for a new trial, the court held the declarations of the plaintiff's attorney rightly excluded. As to the rule of damages, Tompkins, J., said:

"It is impossible to determine, whether the circumstance of the defendant having made a false return to the writ operated on the minds of the jury to increase the damages. The judge was perfectly correct in stating to them

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\* *Potter vs. Lansing*, 1 J. R., 215. See *Balden vs. Temple* (Hobart, 202), for a nominal escape, but which decides nothing as to the point we are here considering. See, also, *Lewis vs. Moreland*, 2 Barn. & Ald., 56; *Brown vs. Jarvis*, 1 Mees. & Wels., 709; and *Scott vs. Henly*, 1 M. & Rob., 227, where Littledale, J., said, "that the sheriff was only liable, for escape on mesne process, for such damages as the plaintiff can show he has actually sustained."

that the return was legally false. But I do not think that, even if the sheriff knew it to be so, it ought to aggravate the damages. The true question is, what has the plaintiff lost in consequence of this escape? The alleged false return by the sheriff, neither adds to nor diminishes the loss; and therefore the solvency of Briggs, or his capacity to pay, must determine the quantum of damages sustained. If the circumstance of a false return be a substantive ground of damages, it would follow, that where the person escaping was perfectly solvent, and the sheriff makes a false return, the creditor might recover in damages more than the full amount of his debt.\*

But a new trial was granted, on the ground that the plaintiff, the consignor—the goods being shipped for account and risk of the West India house—could not have recovered against Briggs, and in this opinion Kent, C. J., and Spencer, J., concurred. Livingston, J., and Thompson, J., who dissented as to the right of the consignor to bring the action, concurred in the rule of damages laid down as above by Tompkins, J. Thompson, J., said: “If the idea communicated to the jury was that they might give what is commonly called smart money, beyond the actual damage of the plaintiff, it was undoubtedly incorrect.”†

In another case in the same State,‡ the plaintiff had on the second Monday of November, 1806, issued a *capias ad respondendum* to the defendant, sheriff of Rensselaer County, against one Abel Turner and others. Turner was arrested by the sheriff, and gave bond on the 5th November, 1806, for the liberties of the jail, and admitted, when arrested, that he owed the plaintiff about \$800; and in November Term, 1806, he confessed a judgment for \$871 36, docketed on the 30th December, 1806. He soon after escaped, and went to Vermont.

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\* This is strong to show, that although the action be in tort still the verdict must be restricted within the limits of legal compensation.

† In an early case on an action of debt for escape, Spencer, J., said: “If an action on the case had been brought, it might have been inquired, what was lost by the escape; and the jury might have given such damages as they supposed the party had sustained.” But in an action of debt, it was there held that every inquiry of that kind was improper, the statute having fixed the extent of the sheriff’s liability, that is, for the original debt and damages recovered; and the plaintiff was confined to the precise amount of his original judgment and costs. *Rawson vs. Dole*, 2 J. R., 454. The remedy given by the action of debt, as we have already seen, no longer exists in New York. See, also, *Van Slyck vs. Hogeboom*, 6 J. R., 270.

‡ *Russell vs. J. Turner, Sheriff*, 7 J. R., 189.

The defendant proved that in November, 1809, Abel Turner was again arrested at the suit of the plaintiff, on his way to Vermont, and gave a cognovit for \$871 39, on which the plaintiff relinquished to him a tract of land in Vermont, which he had received as security, and which a witness testified was of more value than the debt, and the plaintiff gave him a receipt in full of all demands, except the suit in Rensselaer County. It was agreed that the execution was to be stayed for one year, and the plaintiff said he meant to charge the sheriff of Rensselaer County. The jury were instructed at the trial, that the plaintiff ought not to recover more than the actual damages which he had sustained, of which they were to judge, and in the estimation of which they had a right to take into consideration all the circumstances. A verdict was given for six cents. On motion for a new trial, it was insisted by the plaintiff, that he was entitled to recover the whole sum due him in the original action.

Thompson, J., delivering the opinion, said,

"The question is, whether it was competent for the sheriff to show that the plaintiff had, after he knew of the escape, relinquished to the prisoner real security for the debt, which he held in the State of Vermont, with a view to recover his demand of the sheriff. The true question in cases of this kind is, what has the plaintiff lost in consequence of the escape. The jury are not confined to the exact damages in the final judgment, as to the amount of the plaintiff's demand, but have a power and discretion to assess such damages as they shall suppose the plaintiff has sustained under all circumstances.

"The value and extent of this security was a proper subject for the consideration of the jury, and could the plaintiff have shown it to be worth little or nothing, it would not have mitigated the damages. As the testimony, however, appeared before the jury, it was sufficient to pay the plaintiff's demand. It was admitted by the plaintiff's counsel, and indeed could not be denied, that the insolvency of the prisoner, or payment of the demand by him, could be given in evidence in mitigation of damages. On what principle could this be done? None other certainly than to show how far the plaintiff had been or was likely to be damnified. If the prisoner had deposited with the plaintiff a sum of money to satisfy his demand when ascertained by judgment, and the plaintiff on discovering that an escape had been made, had surrendered up the money, could it be doubted that the sheriff might avail himself of it in mitigation of damages? Or, suppose the suit upon a bond which was secured by mortgage on real property, and the creditor on discovering the escape should discharge the mortgage, would not this circumstance be admissible in mitigation of damages? All these cases depend on the same principle, and necessarily result from the nature of the action, which is given to the plaintiff by way of indemnity for the actual injury which he sustains by reason of the escape;

and the plaintiff ought not to be permitted to avail himself of his own acts or misconduct to enhance the damages."

Again,\* where suit was brought by the plaintiff as assignee of the sheriff, on a bail bond, given by the defendants, conditioned that one Brown should keep the liberties, &c., the plaintiff proved his judgment and the escape. The defendant proved that Brown was insolvent, and only possessed a cow worth sixteen dollars. The judge directed the jury to find a verdict for the plaintiff for sixteen dollars, the value of the cow, which was done. There were cross motions in arrest of judgment and for a new trial. Both motions were denied, the court saying, "The plaintiff is entitled, *prima facie*, to recover his whole debt, which is presumed to be lost by the escape; and it could only have been reduced down to the sum found by the verdict, upon the evidence given, that if the party had not escaped there was no ground to consider that any greater sum could have been recovered of the original defendant by the coercion of confinement."

In a recent case, in the same State,† the question as to the burden of proof was distinctly presented. In that case the sheriff of New York was sued for the escape of one Kelly, against whom the plaintiff had recovered a judgment for \$10,722 98; the debt and escape being proved, the C. Judge (Edwards) charged, that to entitle the plaintiff to recover beyond nominal damages, it was incumbent on them to show the extent of the injury sustained by them, and a verdict for such damages only was accordingly rendered. On motion for a new trial, the court held the burden to be on the defendant, and granted a new trial; admitting, however, that their decision was at variance with the English rule; but insisting that it was not unreasonable to assume that the plaintiff had lost his debt by the defendant's negligence, until the contrary should be proved.

The same point was decided in the same State,‡ in an action on the case for neglect in the execution of a writ of *fiery facias*, the court "holding the defendant *prima facie* liable for

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\* Kellogg vs. Brown, 9 J. R., 300.

† Patterson vs. Westervelt, 17 Wendell, 543.

‡ The Bank of Rome vs. Curtiss, Sheriff, &c., 1 Hill, 275.

the whole debt, and conclusively so, unless he can mitigate the amount by showing that he was unable to collect it by an exercise of proper diligence, as, if the defendant in the execution was insolvent, or the plaintiff himself have been the cause why the whole was not collected."\*

The same law was again laid down in an action brought against a sheriff for neglecting to return a *fi. fa.*, an omission of duty for which the Revised Statutes of New York† have declared that the officer shall be liable for *the damages sustained* by any party aggrieved.‡

In Vermont the rule seems stringent, though the action on the case is resorted to. It has been well understood and universally recognized in that State for thirty years, that an officer who holds penal process against a debtor upon whom he may serve it, but who omits to do so, or having once had an opportunity to arrest the debtor neglects to do it, and the debtor afterwards absconds, becomes *fixed with the debt*; and, of course, no evidence as to the debtor's insolvency is admissible.§ So in the same State, in an action against the sheriff for the escape of the debtor from the liberties of the jail, he having taken insufficient security, the rule of damages is the amount of the debt.¶

In Illinois, in actions upon the official bond of a constable for failure to return an execution, the measure of damages is the amount of the execution, with interest from the date of the judgment on which it issued, notwithstanding the defendant in the execution was wholly insolvent from the time of its issue to that of its return.¶

In these cases it will be noticed that the relief does not go

\* Pardee vs. Robertson, 6 Hill's Reports, 550.

† V. II., 358, § 80, (2d edition).

‡ But in Stevens vs. Rowe, 8 Denio, 827, case against a sheriff for not returning a *fi. fa.*, the two last cited cases were doubted, and it was said, while admitting the rule that *prima facie* the officer in default was liable for the whole debt, still he might mitigate the amount not only by showing his inability to collect the money, but also by proof that *the debt is still safe and collectable*. As to the liability of the sheriff in cases of false return and neglect, see Hinman vs. Borden, 10 Wend., 367, and Persons vs. Parker, 8 Barb. S. C. R., 249.

§ Goodrich vs. Starr, 18 Verm., 227.

¶ Wheeler vs. Pettes, 21 Verm., 398. See, in the same State, Vilas vs. Barker, 20 Verm., 602, an action against a sheriff for refusing to assign a jail-bond to the creditor.

¶ Robertson vs. County Com'rs, 5 Gilman, 559. This decision is founded on the statute of that State.

beyond the amount of loss actually sustained. But it would seem, if actual malice, fraud, or oppression can be shown on the part of the officer, that it would be competent for the jury to go beyond the line of compensation for actual injury, and award vindictive or exemplary damages; and so it has been frequently held, although we have seen a contrary intimation in New York.

In Connecticut, it was originally decided, that an officer who had been guilty of neglect in not serving mesne process, should be liable for the whole debt; a rule which has been there characterized "as one of stern policy, rather than of exact justice;" and it is now well settled that the plaintiff can only recover the damages he has sustained. "But these damages it is peculiarly the duty of the jury to assess, and in so doing they are not limited to any precise sum; they may even give more than the plaintiff's original debt. When that debt has been lost by the willful misconduct or negligence of the officer, they may add to it the costs of a second suit; and as the jury may give more than the debt, so they may give less. If it should be found by them, that the failure of the officer to return a writ was owing to a mere mistake, in consequence of which the party had suffered nothing, they might give, and indeed it would be their duty to give, only nominal damages."\*

In North Carolina the remedy of debt is given against the sheriff who shall willfully or negligently suffer a debtor charged in execution to escape; and in this action, as I have said, there is no question as to the measure of damages, the sheriff is fixed with the debt.† In the same State, in regard to mesne process, it has been said, that the true inquiry is, whether the debtor had any property which might by due process have been subject to execution, and whether the sheriff by his negligence has deprived the plaintiff of his remedy. But it is no answer for the sheriff to say that the debtor, even after being imprisoned, might pay, or secure to be paid by assignment, other *bona fide* debts, to the disappointment of the plaintiff.‡ Nor on such pro-

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\* *Palmer vs. Gallup*, 16 Conn., 555, and *Duryee vs. Webb*, cited in notes to this case. See *Clark vs. Smith*, 9 Conn., 387, as to previous rule. *Gleason vs. Chester*, 1 Day, 152; *Hubbard vs. Shaler*, 2 Day, 195.

† *Adams vs. Turrentine*, 8 Iredell, 147.

‡ *Sheriff vs. Shuford*, 10 Iredell, 200.

cess is the reputation of the defendant as an insolvent any excuse; the officer is bound to ascertain for himself whether there is property to satisfy the writ.\*

In Arkansas, also, it has been held, that in actions for escape from mesne process, the presumption is, that the plaintiff lost the entire debt by the escape; and the measure of damages against the officer is the amount of the original debt; but the defendant is at liberty to prove in mitigation of damages that the debt could not have been made out of the debtor.†

In Georgia, in an action of debt upon the sheriff's official bond for an escape on mesne process, it has been held that the insolvency of the original debtor may be given in evidence by the defendant in mitigation of damages,‡ and in that State the opinion of a witness may be given in evidence as to the insolvency of a party, provided it be accompanied by the facts on which the opinion is founded.§

In Massachusetts it has been said, that in actions of this kind, "it is peculiarly the right of the jury to assess the damages, and in this they are not restricted to any precise sum."¶ And so again, that "the jury have the subject of damages at their discretion."‡ But notwithstanding this general language, the rule appears settled there in conformity with that in New York; namely, that the amount of the plaintiff's debt is *prima facie* the measure of damages; \*\* that it is competent for the defendant to show in mitigation of damages any circumstances which go to prove that the plaintiff has in truth not suffered

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\* *Parke v. Alexander*, 7 Ired., 412. *State v. Edward*, 10 Iredell, 242.

† *Faulkner v. Bartley*, 1 English, 150.

But in the same State it is also held that in declaring against a constable for failing to levy an execution, it is necessary to allege that the defendant in the execution had property on which the levy might have been made. The Court say the officer was under no legal obligation to make the levy unless the defendant had property at the time upon which to make it, and it was incumbent on the plaintiff to allege the fact in the declaration, and this correctly, for no such presumption exists on executions against property before levy, as on mesne process after arrest. *State, use of Brooks, v. Kirby*, English Reports, I., 453.

‡ *Crawford v. Andrews*, 6 Georgia, 244.

§ In Indiana, by statute, in case of a false return to a writ of *fiat facias*, the constable and his sureties are liable on the bond for the full amount which the officer might have collected and paid over with interest and ten per cent. damages. R. S., 1838, 148. *Limpus v. The State*, 7 Blackf., 43.

¶ *Weld v. Bartlett*, 10 Mass., 470; and *Colby v. Sampson*, 5 Mass., 810.

‡ *Rich v. Bell*, 16 Mass., 294. See, also, *Burrell v. Lithgow*, 2 Mass., 526.

\*\* *Young v. Hosmer*, 11 Mass., 89.



any actual injury from the loss complained of,\* and that, on the other hand, it is competent, if the wrong be a willful one, for the jury to give more than the actual loss.† In a recent case in that State where case was brought against a sheriff for not taking sufficient bail, the principal debtor being sued to judgment and the execution returned unsatisfied, this language was held; "Although the amount of the judgment is *prima facie* evidence of the measure of damages, yet this may be controlled by evidence showing the entire inability of the debtor to pay, and the actual injury therefrom to be less than the amount of the judgment against him." And although the principal debtors had left the State, and could not be found on the execution, evidence as to their poverty was held admissible, the court saying, "The fact that the principal debtors were out of the commonwealth, and could not be arrested on execution, may be important in its bearing upon the amount of damages sustained by the default of the sheriff, but it does not affect the rule of damages, or the competency of evidence tending to show the entire inability of the debtor to satisfy the demand. In all actions on the case, the question is, what is the amount of damage sustained."‡

It is a general principle that in an action against a sheriff for taking insufficient sureties, no more can be recovered against him than the party could have recovered against sufficient sureties.§ And in an action against the sheriff for taking insufficient sureties in replevin, the assignee of the replevin bond, cannot recover as special damage, beyond the limits of the bond, the expenses of a fruitless action against the pledges, unless he gave the sheriff notice of his intention to sue them.]

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\* Brooks *vs.* Hoyt, 6 Pick., 468. Shackford *vs.* Goodwin, 18 Mass., 187. Nye *vs.* Smith, 11 Mass., 188.

† Weld *vs.* Bartlett, 10 Mass., 470: Though in this case it was intimated that the limit of the discretion of the jury, even in case of willful wrong, is merely "expenses and costs not taxable." See, also, Selfridge *vs.* Lithgow, 2 Mass., 374.

‡ West *vs.* Rice, 9 Met., 564.

§ Yea *vs.* Lethbridge, 4 T. R., 488. Evans *vs.* Brander, 2 H. Bl., 547. By this Concanen *vs.* Lethbridge, 2 H. Bl., 86, was overruled. See, also, Jeffry *vs.* Bastood, 4 A. & Ellis, 828.

] Baker *vs.* Garratt, 8 Bing., 56. See Gibbs *vs.* Bull, 20 J. R., 212, a suit for taking insufficient pledges in replevin.

In Connecticut, where the plaintiff, an officer who had, by virtue of an execution, levied on goods belonging to the judgment debtor, and delivered them to the defendants on their receipt or promise to re-deliver, which not being done suit was brought,

We have hitherto been examining cases where the public officer is charged with neglect in not executing process confided to him. There is another large class of cases where the complaint is that he has overstepped his powers and abused the process of the court. In these cases we shall find that where the acts of public officers are illegal, they are very narrowly watched, and often, by the infliction of vindictive damages, severely punished for the abuse of their trust; so, where trespass was brought for breaking and entering the plaintiff's house, and taking his goods, it appearing that judgment had been obtained in a court of local jurisdiction, and that execution was illegally levied on property of the plaintiff *out* of the jurisdiction, it was held that the plaintiff was entitled to recover the amount paid by him to release the levy. It was insisted that, as the plaintiff clearly owed the debt, this rule could not apply. But Lord Denman, C. J., said, "A person who takes on himself to extort money by an authority which he does not possess, must repay the money which he receives thereby." And Patterson, J., said, "I am afraid of admitting the principle contended for, that where money has been extorted by means of an illegal authority, the measure of damages is to be merely the amount of injury actually sustained."\*

So where the defendant, acting under color of a *ca-sa*, was found guilty of an assault and battery and false imprisonment, Lord Abinger, on a motion to reduce the damages, said, "I think, if I had tried the cause, I should probably have said that if parties knowing what the law is wantonly violate it, the jury should not be sparing in the damages. It is the safest way to say that he who knowingly violates the law in one respect must take all the consequences."† So in a recent case where the defendants, under color of process, illegally broke into the defendant's house to levy an execution, and the plaintiff paid the amount due on the writ, under protest, to induce the defendants to withdraw; the jury gave the amount so paid

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it was objected that, as it was not stated in the declaration that the officer was commanded, in the writ against the original debtor, to attach to any certain amount, the plaintiff could only recover nominal damages; but the Supreme Court held otherwise, and that the omission did not preclude the plaintiff from a recovery to the amount of the execution. *Jones vs. Gilbert*, 18 Conn. R., 507.

\* *Champion vs. White*, 2 Nev. & Perry, 627; S. C., 6 Adol. & E., 407.

† *Kerby vs. Denby*, 1 M. & W., 386; *Tyrwh. & Gr.*, 688.

and £500 besides, damages; a motion was made to reduce the damages, but the court said, "The trespasses were of a very serious nature, having been committed by officers of the law, under color of the law, breaking open the door with great violence. Such conduct is calculated to lead to dangerous conflicts, and the proper amount of damages must depend so much on the general circumstances, that it is very difficult to discover any standard by which to measure the amount; much must be left to the discretion of the jury."\*

So, in an action of trespass *de bonis asportatis*, for an illegal levy, it was held "that the jury might give vindictive damages if they should find that the trespass was committed maliciously, and in a wanton and aggravated manner, and with a design to vex and injure the plaintiff."†

On the other hand, the following case in Pennsylvania is a strong one, to show with what vigilance the courts adhere to the principle of applying a fixed rule even in actions for tort.‡ It was trespass against the defendants for a levy on the plaintiff's property under an execution against a third party; and it appeared that the latter had made a conditional sale to the plaintiff, whose property they were to remain till fully paid for. Part had been paid. The court told the jury "to find for the plaintiff the value of the property taken, and interest, and such further amount as, under all the circumstances of the case as argued by the counsel before you, you may think him entitled to demand, if any." But on error, this was held wrong:

"From this instruction," said the Supreme Court, "we entirely dissent. It appears in evidence that the vendee had paid at least part of the price, and, so far as it appears to us, a considerable part of it. The vendor and vendee stand, therefore, in this position at the time of seizure and sale: The vendor had the legal title, the vendee an equity to the amount he had paid. But, by the instruction of the court, the vendor recovers not only the value of his own interest, but the interest of the vendee also. Now, this cannot be; for the only just rule of compensation will be, to remunerate him for the amount of injury he has sustained, which is commensurate with his interest in the chattel. Beyond that, upon no principle of law or equity is the jury permitted to go, unless in cases of gross oppression or aggravation, when the jury may mulct a party

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\* Duke of Brunswick *vs.* Slowman, 8 Man. Gr. & Scott, 817.

† Huntley *vs.* Bacon, 15 Conn., 267.

‡ Rose *vs.* Story, 1 Barr. State R., 191.

with vindictive damages. But this is a case for compensatory, and not vindictive damages, as clearly appears from the evidence. We also think that the latter part of the instruction is highly objectionable. The court allows the jury to give such further damages as, under all the circumstances of the case as argued by the counsel, they might think them entitled to demand. This is giving them a discretionary power, without stint or limit, highly dangerous to the rights of the defendants; it is leaving them without any rule whatever. The rights of the defendant are made to depend on the arbitrary will of the jury, of the effects of which this verdict presents a warning example. Nothing appears which should swell the damages beyond the value of the interest which the vendee had in the property sold by the constable."

Questions of the kind we are now considering frequently arise in suits brought by one officer against another to test the relative priority of different processes; and in such a case it has been said, in Vermont, that damages are never given beyond the actual value of the property.\*

In regard to mitigation of damages in these actions, it has been held in Maine, in a suit against a sheriff for not safely keeping property attached on mesne process, that the plaintiff was entitled to recover the full value of the property seized, and that the damages could not be mitigated by deducting the expenses which would have necessarily attended the keeping, had it been kept safely.† And in Pennsylvania, it has been held in trespass against a sheriff for seizing and selling the plaintiff's goods under a judgment against another person, that the amount paid out of the proceeds of sale for rent of the premises, cannot be received in evidence to abate the damages.‡

In some of the States of the Union, property when levied on is sometimes delivered by the attaching officer to a third party called a receptor, who holds it during the litigation, and promises to re-deliver it to the officer on demand. In a case of this kind in Vermont, the plaintiff, whose property had been unduly levied on instead of that of the real debtor, brought his action of trespass and, *pendente lite*, assigned his claim to the receptor. Judgment was afterwards obtained and execution issued in the suits in which the attachment had been issued, and the officer demanded the property of the receptor; but he refused to de-

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\* Goodman vs. Church, 20 Verm., 187.

† Lovejoy vs. Hutchins, 28 Maine, 272.

‡ Dallam vs. Fidler, 6 Watts & Serg., 323. See, also, McMichael vs. Mason, 18 Penn. State R., 214.

liver it. It was held that the defendants, on the trial of the action of trespass, were not entitled to give in evidence, in mitigation of damages, such refusal on the part of the receptor, they never having offered to surrender to him his receipt, or discharge him from his liability thereon;\* and the same point has been similarly decided in Massachusetts.†

In another case of this kind it has been decided in Vermont, that where the value of all the property attached and receipted for is expressed in the receipt at one entire sum, and a portion of it has been withdrawn from the custody of the receptor so as to discharge his liability, the damages in an action on the receipt are to be determined by assuming the whole value of the property receipted for to be the sum specified in the receipt, and by then ascertaining, on the basis of that assumed value the just proportion which the property retained by the receptor would bear to the property for which he is not liable.‡

Where suit is brought against a sheriff for a false return of *nulla bona* to an execution, it seems that an inquisition finding the property out of the original defendant, is a bar to the action; but in a suit against the officer in trespass by the true owner, an inquisition finding the other way is only to be received in mitigation.§

In Massachusetts, where a sheriff returned to the original writ that he had taken bail, and then refused to deliver the bail bond, the fact being that no bail had been taken, he was not permitted to show in mitigation, that the original defendant was insolvent.||

In New York it has been held that where the sheriff so negligently conducts himself in regard to personal property levied on that it is lost, and in consequence the real estate of the defendant is sold and the security of a mortgage creditor is impaired, no action lies by such mortgage creditor against the sheriff, unless the conduct of the sheriff be explicitly charged

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\* *Ellis vs. Howard*, 17 Verm., 330.

† *Robinson vs. Mansfield*, 18 Pick., 139.

‡ *Parsons vs. Strong*, 18 Vermont, 285. *Allen vs. Carty*, 19 Vermont, 65.

§ *Bayley vs. Bates*, 8 J. R., 185. *Townsend vs. Phillips*, 10 J. R., 98. *Farr vs. Newnan*, 4 T. R., 621, 638, 648. *Roberts vs. Thomas*, 6 T. R., 83. *Wells vs. Pickman*, 7 T. R., 174, 177.

|| *Simmons vs. Bradford*, 15 Mass., 82.

to be *fraudulent and with intent* to diminish the security of the mortgage creditors.\*

Questions of an analogous nature to those which we have been considering, are frequently presented in actions against public officers, other than sheriffs.

Where trespass was brought against the collector of customs for New York,† for illegally seizing the plaintiff's vessel, it appeared that she was seized on the 2d October, 1801, and retained in custody till the 25th Aug., 1802, when she was restored. Six months before the seizure, the plaintiff had purchased her for \$12,474, and the day previous to the trespass, he made a contract to sell her for \$9,500. On the 2d Sept., 1802, eight days after her restoration, she was finally sold at public sale for \$4,288; the plaintiff claimed the sum of \$9,500 (the contract price), with interest and marshal's fees, deducting the price actually obtained at the sale, \$4,288; and this was held right by the Supreme Court of New York. This recognizes the principle, that where an actual bargain is interfered with by the defendant's tortious act, he shall be made responsible for the loss sustained. It is not a case of mere contingent damages or speculative profits; it is an actual contract broken up by an unauthorized act.‡

In a recent action against a collector of customs, for refusing to sign a bill of entry for landing a cargo of foreign wheat, in consequence of which the plaintiff was obliged to pay duty on it when, in fact, no duty was by law payable, the proper measure of damages has been held by the King's Bench in England to be, not merely the amount of duties paid, but the amount of loss sustained by the plaintiff in consequence of a subsequent fall in the price of the article.§

In an action by the United States against a collector on his official bond, for not returning paid treasury-notes to the proper department at Washington, it has been held that the rule of damages would be the amount of the notes, unless it was shown that they were canceled, and that the United States had suffered, or was likely to suffer, less than their amount; and that

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\* *Bank of Rome vs. Mott*, 17 Wend., 554. See *Yates vs. Joice*, 11 J. R., 186.

† *Woodham vs. Gelston*, 1 J. R., 184.

‡ Vide *supra*, 81, 520.

§ *Barrow vs. Arnaud*, Feb. 8, 1846. *Jurist*, vol. x., 819. 8 Q. B., 595.

the jury were to take into consideration the amount of damage, from the risk of the notes getting into circulation again ; from the delay and inconvenience in obtaining vouchers to settle the accounts ; and from the want of evidence at the department that the notes had been redeemed.\*

In New York it has been held, that where the property of a party is sold under illegal process, and the sum demanded is raised by a bid at the sale of the property, made by an agent of such party, who purchases for the benefit of his principal, and pays for the same with the money of the principal, the measure of damages, in an action of trespass against trustees of a school district, in such case, is the amount of the bid and the interest thereof, and not the value of the property sold.†

The questions examined in this chapter may arise, as in the instances which we have been considering, in suits brought by the aggrieved party against the officer directly ; or, otherwise, on the bond given by him for the faithful discharge of his duty ; or, again, they may be brought against the sureties of the officer. In the case of the suit being brought on the bond, much depends on the form of the instrument and the statute under which it is given. So in Ohio, an action of debt being brought on a sheriff's bond for neglect to sell property levied on, the rule of damages was held to be the value of the property and not the amount of the judgment, and execution was only allowed to issue for the former sum, the language of the statute under which the bond was given being, that " execution might issue for such sum as it might be ascertained would be sufficient to *indemnify* the person so suing."‡

Where the suit is brought against a surety, the measure of damages often presents very nice and complicated questions, growing out of the fact that the inquiry involves an investigation of the violation of duty of the principal as well as breach of contract of the surety. In these cases it seems to be well settled,§ that judgment against the principal is *prima facie* evidence of negligence in the suit against the surety, at all events where he has had no notice of the suit being brought.

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\* U. S. *vs.* Morgan, 11 Howard, 154.

† Baker *vs.* Freeman, 9 Wend., 36. See to same point, Clark *vs.* Hallock, 16 Wend., 607.

‡ Ohio, use of Morgan *vs.* Myers et al., 14 Ohio, 538.

§ Supra, 308, and cases there cited.

In a case in Massachusetts, brought against the sureties of a constable's bond, where the breach assigned was an illegal levy, and it appeared doubtful whether all the property in question was taken *colore officii*, a verdict being taken for the penalty of the bond, the court said, "If it appears that *any* of the property was taken by color of office, as it no doubt does here, that shows an official misfeasance, which is a breach of the bond, and entitles the plaintiff to judgment as for such breach. But when it comes to the assessment of damages, and it is open to question whether the trespass, for which judgment was recovered in the action of trespass, was done by color of office, it will no doubt be competent to the court or jury who assess the damages to ascertain what part of the property was so taken; for it is that part only which is in question in the suit." It was also held that the fact that the goods levied on had been mortgaged by a previous owner before the levy, and that they had been delivered by the constable to the mortgagee on his demand, was no defense to the action, but that upon a hearing in equity, this evidence would be admissible in reduction of damages.\*

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\* City of Lowell *vs.* Parker, 10 Met., 309. As to cases in other States, see State Treasurer *vs.* Weeks, 4 Verm., 215. Governor *vs.* Matlock, 1 Hawks., 425. Duncan *vs.* Klinefelter, 5 Watts, 144. Hazard *vs.* Israel, 1 Binn., 240. Shewell *vs.* Fell, 3 Yeates, 17. S. C., 4 Yeates, 47. Eaton *vs.* Ogier, 2 Greenleaf, 46. Riggs et al. *vs.* Thatcher, 1 Greenleaf, 68. Gibson *vs.* The Governor, 11 Leigh, 600. Brugh *vs.* Shanks, 5 Leigh, 598. Rootes *vs.* Stone, 2 Leigh, 650. Smith *vs.* Hart, 2 Bay, 395. Patten *vs.* Halsted, 1 Coxe, 277. Gerriah *vs.* Edson, 1 N. H. R., 82. Webster *vs.* Quimby, 8 N. H. R., 382. Bruce *vs.* Pettengill, 12 N. H. R., 341. Peverley *vs.* Sayles, 10 N. H. R., 356. Sawyer *vs.* Whittier, 2 N. H. R., 815. Sanborn *vs.* Emerson, 13 N. H. R., 58. Richards *vs.* Gilmore, 11 N. H. R., 493. Runlet *vs.* Bell, 5 N. H. R., 438. Perkins *vs.* Thompson, 8 N. H. R., 144. Cady *vs.* Huntington, 1 N. H. R., 188. Taylor *vs.* Commonwealth, 8 Bibb, 356. Ackley *vs.* Chester, 5 Day, 221.



## CHAPTER XXII.

### THE MEASURE OF DAMAGES IN CASES OF TRESPASS TO PERSON OR TO PROPERTY.

In every case of trespass, damages are recoverable whether the act was intentional or accidental. But if no aggravation is shown, the rule of damages is generally a question of law—Case or Trespass for injuries to property—Decisions examined—Mitigation—Case or Trespass for injuries to person—Decisions examined—Mitigation—Case or Trespass where Fraud is averred—Fraud in sale of lands—Mitigation and Recoupment—General Principles.

I PROCEED now to examine the measure of damages for those remaining wrongs, either to the person or personal property, which are redressed by the actions of case and trespass; proceedings which are so closely allied to each other, and the line which separates them so difficult to define, that for our present purpose it will be more convenient to treat them together.

We have already had occasion to notice\* that in all cases of trespass, although purely unintentional, unless caused by absolutely inevitable accident, the party in default must respond in damages; and that the intent is only material in aggravation or mitigation of damages. We have seen that in cases of contract the motive of the defendant is not inquired into to augment the remuneration to be made by him. On the other hand, in cases of trespass the absence of evil motive cannot be set up as an excuse so far as to bar the action. "I had learned," says Lord Kenyon, "from Lord Bacon's maxims, that there is a distinction between answering *civiliter* and *criminaliter* for acts injurious to others; in the latter case the maxim applied is, *actus non facit reum nisi mens sit rea*; but it is otherwise in civil actions, where the intent is immaterial if the act done be injurious to another."† And so says Mr. Chitty, "Where

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\* Chapter, XVIII., 455.

† *Haycraft vs. Creasy*, 2 East, 90.

the act occasioning an injury is unlawful, the intent of the wrongdoer is immaterial."\*

It follows, from what has been said, that in the cases of wrongs such as we now proceed to consider, the measure of relief does not depend on the form of the action; whether case or trespass be employed, if no aggravation be proved, the rule of damages is a question of law; and it is competent in either proceeding, to show those circumstances of evil motive which, as we have already seen, go to place the subject of relief largely within the control of the jury.

In regard to this class of cases generally, it will be noticed that the object is to limit relief to compensation, as that term is legally understood; and we shall find, therefore, that while the power of the jury over the subject in cases of aggravation is fully recognized, still, even where such facts are presented, if evidence has been admitted or directions given at the trial, which, had the intention of the jury been to give compensatory and not vindictive damages, would have been incorrect, the court, assuming that such was the purpose of the jury, will exercise their control over the subject. "We consider the law," says the Superior Court of New York, "as properly and wisely settled that the quantum of damages, with the exception of cases in which exemplary or vindictive damages may properly be given, is strictly a question of law; so that the jury are bound by the rule which the judge directs them to follow.† This will appear by the cases which we now proceed to examine.

And a convenient division of the subject appears to be produced by grouping together, first, those actions where case or trespass is brought for injuries to personal property; secondly, those where redress is claimed for injuries to the person; and lastly, where actual fraud is complained of.

It may not be improper to make some preliminary observations as to the right in which the action is brought, so far as it affects the question of damages. In all cases the absolute or general owner of personal property, whose rights are infringed, can maintain the action. So can the special owner. And in this country the rights of another class of parties interested

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\* Chitty on Pleadings, Vol. I., 147.

† *Snydam vs. Jenkins*, 8 Sandford, 628, per Duer, J. See, also, *Baker vs. Wheeler*, 8 Wendell, 505.

have been recognized. So where a defendant fraudulently removed buildings of a judgment debtor from certain premises on which the judgment was a lien, with intent to defeat the lien of the plaintiff's judgment, it was held that the plaintiff was entitled to recover. And so a mortgagee can recover against a party for wrongfully removing buildings from the mortgaged premises, or for any fraudulent injury to the value of the premises. But in cases of this description, the plaintiff must show that he *necessarily suffered damage* by the act complained of; in other words, that there was not property enough left to satisfy the execution, or the mortgage.\*

We proceed now to notice the general rules which govern in trespass for taking personal property, or as it is technically called, trespass *de bonis asportatis*. And, as we have said, although this is eminently an action where, in case of evil motive, the damages are under the control of the jury, and although for that purpose all the circumstances of the transaction may be given in evidence, still the determination of which I have spoken, to adhere to the rule of compensation, has been frequently made manifest.

So it has been often decided, that where trespass is brought for personal property and no circumstances of aggravation are shown, the action is to be regarded as one of trover, and the value of the property with interest furnishes the measure of damages.

As to the plaintiff's title, it has been held at *nisi prius*, where he was a collector and transmitter of small parcels and responsible for their safe delivery, that he could recover the full value against a railway company, in an action of case for negligence, on the ground of his liability to pay their value to the true owner whether he had actually paid it or not.†

In Maine, in an action of trespass *de bonis asportatis*, it was ruled at the trial, that the jury should give the value of

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\* *Yates vs. Joyce*, 11 J. R., 186. *Lane vs. Hitchcock*, 14 J. R., 218. *Marsh vs. White*, 8 Barb. S. C. R., 518. *Gardner vs. Heartt*, 8 Denio, 232; but not for mere negligent injury. In *Barber vs. Matthews*, 1 Denio, 385; it was held that the principle allowing a recovery in cases of this kind must be limited to real property; and that for similar injury to personal property levied on, the suit must be brought in the name of the party making the levy.

† *Crouch vs. Railway Co.*, 3 Car. & Kir., 790.

the property at the time it was taken, and *something for the detention*. But on motion for a new trial, the court said,

"For an injury done to property, such as is this case, the value of the property at the time of the injury is the measure of damages. There may be circumstances enhancing that value to the party injured, which may be properly taken into account. To the value here, interest might be added as a part of the plaintiff's indemnity. But as the term *interest* was not used, and probably not intended as the limit of damages for *detention*, the jury were at liberty to go into an estimate of the probable or speculative loss the plaintiff might have sustained on this ground. In our judgment, the instruction was too vague and loose, and had a tendency to mislead the jury."\*

So in Texas, in an action of tortious conversion analogous to that of trover, where, although there was no other evidence of damage than the value of the property, and no proof of fraud, violence, or malice, yet the jury had given double the value, the verdict was set aside.†

In New York, however, it has been held that in an action on the case for the wrongful detention of personal property, the plaintiff might recover damages for the time lost and expenses incurred in pursuit of the property.‡

In an action of trespass, on the Pennsylvania circuit, the whole subject was very ably discussed by Mr. Justice Baldwin.§ The plaintiffs lent \$60,000 to one E. Thompson, who took bills of lading of a cargo of teas, and assigned them to the plaintiffs. The teas bought were shipped to Philadelphia, where they were taken on a *feri facias* at the suit of the United States against Thompson. The defendant was the marshal who made the levy. As to the rule of damage, it being settled|| that the plaintiffs were the legal owners of the teas and not to be regarded as mere mortgagees, Baldwin J., charged the jury as follows :

"The rule which ought to govern jurors in assessing damages for injuries to personal property, depends much on the circumstances of the case. When a trespass is committed in a wanton, rude, and aggravated manner, indicating

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\* Brannin vs. Johnson, 19 Maine, 361.

† Smith vs. Sherwood, 2 Texas R., 460.

‡ Bennett vs. Lockwood, 20 Wend., 223. Vide supra, 525.

§ Pacific Insurance Co. vs. Conard, 1 Baldwin, 138. See Atlantic Co. vs. Conard,

1 Peters, 386. Nicoll vs. Conard, 4 Peters, 291.

|| 1 Peters, 386, and 4 Peters, 291.

malice, or a desire to injure, a jury ought to be liberal in compensating the party injured, in all he has lost in property, in expenses for the assertion of his rights, in feeling or reputation; and even this may be exceeded by setting a public example to prevent a repetition of the act. In such cases, there is no certain fixed standard; for a jury may properly take into view not only what is due to the party complaining, but to the public, by inflicting what are called in law, speculative, exemplary, or vindictive damages. But when an individual acting in pursuance of what he conceived a just claim to property, proceeds by legal process to enforce it, and causes a levy to be made on what is claimed by another, without abusing or perverting its true object, there is and ought to be a very different rule, if after a due course of legal investigation, his case is not well founded. This is what must necessarily happen in all judicial proceedings, fairly and properly conducted, which are instituted to try contested rights to property. The value of the property taken, with interest from the time of the taking down to the trial, is generally considered as the extent of the damages sustained, and this is deemed legal compensation, which refers solely to the injury done *to the property taken*, and not to any collateral or consequential damages *resulting to the owner*, by the trespass. These are taken into consideration only in a case more or less aggravated. But where the party taking the property of another by legal process, acts in the fair pursuit of his supposed legal right, the only reparation he is bound to make to the party who turns out ultimately to be injured, is to place him, as to the property, in the same situation in which he was before the trespass was committed. The costs of the action are the only penalty imposed by the law, which limits and regulates the items and amount. In the present case, the defendant acted under the orders of the government, in execution of his duties as a public officer; he made the levy, but committed no act beyond the strictest line of his duty, which placed him in a situation where he had no discretion. The result has been unfortunate for him; he has taken the property of the plaintiffs for the debt of Edward Thompson, and must make them compensation for the injury they have sustained thereby, but no further.

“It has long since been well settled, that a jury ought in no case to find exemplary damages against a public officer, acting in obedience to orders from the government, without any circumstance of aggravation, if he violates the law in making a seizure of property. In the case of Nicoll against the present defendant, Judge Washington instructed the jury that they might give the plaintiff such damages as he had proved himself to be justly entitled to, on account of any actual injury he had proved to their satisfaction he had sustained by the seizure and detention of the property levied on, but that they ought not to give vindictive, imaginary, or speculative damages. The affirmation of his charge makes it the guide for us in this case. Our true inquiry, then, must be: what damages have the plaintiffs so proved themselves to be entitled to?

“There can be no doubt that they have a right to the value of the teas at the time of the levy, with interest from the expiration of the usual credit on extensive sales. You may ascertain the value from the sales made at New York or this place, in the spring of 1826. If, in your opinion, they afford evidence of their real value, or if you are satisfied from the evidence you have

heard, that the seizure and storing of these teas had the effect of depressing the prices, you may make such additions to the prices at which sales were actually made, as would make them equal to what they would have been had they come to the possession of the plaintiffs at the time of the levy. \* \* \*

"It is in the sound discretion of Courts of Admiralty to allow or refuse counsel fees, according to the nature of the case, either as damages or a part of the costs, as in the case of the *Apollo*; but by a late case, they were allowed as costs in a case where it was adjudged by the Supreme Court that no damages could be claimed. They form an item of costs in such courts, but not in courts of common law. It would be legislation by the common law courts, to order them to be taxed as costs. The expenses of prosecuting claims of the present description, do not come within the principles established by the courts in causes of admiralty jurisdiction, but seem to be considered as extra damages, beyond the value and interest, where there is aggravation, but not otherwise.

"I think it is a safe rule in common law actions of trespass, and can perceive no sound reason for holding a marshal to a harder rule of damage than a naval or revenue officer, or the owner of a privateer. The same principle ought to govern all alike; or if any discrimination prevails, it should be in favor of the defendant, who could use no discretion, but was bound to do the act which has exposed him to this action.

"The case of *Woodham vs. Gelston* (1 J. R., 137), seems to me to be based on this rule; and the damages recovered in that case were only such as related to the property. The marshal's fees were for seizing and keeping possession of the vessel. On the restoration to the plaintiff, he paid them: they were a charge on the property, in the nature of storage or bailment. In sanctioning this item, the court seem to put it on the ground of its being a charge on the defendant; and having been paid by plaintiff, he was entitled to recover it back. But they say, if it had been a mere voluntary payment, a deduction would have been proper. The other items were for wharfage and ship-keeping, which were disallowed, because they were after the restoration. These were all the claims for expenses presented in that case, and they all attached to the property taken; none related to personal expenses in prosecuting the suit.

"In declaring that voluntary payments shall be deducted, the court settled the principle as to the right to charge for the marshal's fees. They held the jury to strict rules; for they struck out an item of compound interest allowed by the verdict.

"On the principle of this case of *Woodham vs. Gelston*, the charges of the auction sales are allowable; because such sale had become necessary, and the expenses thereof became a charge on the teas. Also fire insurance, which is a substitute for bailment, and the premium paid in place of storage.

"It is all-important, that in matters of this kind, the principle which governs them should be fixed and uniform. If we once begin to diverge from the old line, it will be difficult to draw and define a new one with accuracy. It may be thought a hardship that the plaintiffs shall not be allowed their actual disbursements in recovering this property; but the hardship is equally great in a

suit for money lent, or to recover possession of land! they are deemed in law losses without injury, for which no legal remedy is afforded.

"I am therefore of opinion that you cannot, in assessing damages in this case, allow any of the items claimed by the plaintiffs for disbursements; they being consequential losses only, and not the actual or direct injury to their property which they have sustained by its seizure and detention, for which alone they are entitled to recover damages in this case, it not being attended with any circumstance of aggravation on the part of the defendant. Had there been any such, a very different rule would have been applied, by reimbursing the plaintiffs to the full extent of all their expenses and consequential losses.

"You will, then, carefully weigh all the evidence in the cause, and ascertain the true value of the teas at the time of the levy, or when they could have come into market by the rules of the custom-house, if there had been no claim asserted to them by the United States other than for the duties with interest; deducting therefrom the net amount of sales after payment of duties and charges of sales, the balance will be the amount to which the plaintiffs will be entitled."\*

We have already, in treating of the action of trover, discussed the question as to the time when the value is to be computed, whether at the time of the illegal act, or at any subsequent period if the value has fluctuated; and the same question presents itself in actions of trespass. In the case just cited, it seems to have been assumed that the period fixing the right of the parties was that of the trespass, and it has been so stated by the Supreme Court of New York;† but on neither of these occasions was the question raised; and whenever it shall appear that after the illegal act the price has risen, and the defendant has received the proceeds or otherwise had the benefit of the property at its advanced value, the tribunals will find great difficulty in escaping from the necessity of taking the highest value up to the time of trial as the rule of compensation.

In an early case in Pennsylvania, for running down a ship, it was intimated that where the act complained of was purely fortuitous, the jury might give less than the value of the property; but I suppose no such discretion exists. If there be any right of action, the least compensation is certainly the value of property taken or destroyed.‡

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\* See this case cited with approbation in an analogous case in Iowa. *Thomas vs. Isett*, 1 Iowa, 470.

† *Brizoe vs. Maybee*, 21 Wend., 144.

‡ *Bussy vs. Donaldson*, 4 Dall., 206.

In a case in Massachusetts, trespass was brought for destroying game-cocks, which had been taken by a public officer acting on an erroneous construction of the statute against gaming. It was held that though cock-fighting is in that State illegal, the sale of game-cocks is lawful, and that the measure of the plaintiff's damages was "what the cocks were worth to him as articles of merchandise or sale, whether the market for them was to be found in that commonwealth or elsewhere."\*

The following English cases serve to illustrate the subject. They exhibit an inclination to treat the wrongdoer, even when not actuated by any malicious motive, with considerable severity. Where the assignees of a bankrupt sold fixtures on leased premises belonging to the plaintiff for £36, a fair price on such sale, but it was shown that as between incoming and outgoing tenant the value would have been £80, it was held that the plaintiff was entitled to recover the latter sum.† Where trespass was brought for taking goods, the plaintiff had, shortly before the alleged trespass, taken possession of the house, fixtures, and furniture in question, under an assignment from one Mason. The plaintiff paid £109 15s. 10d. for the fixtures and goods: the defendant, a sheriff, entered, and under color of an execution against Mason, sold them for £73. The plaintiff had himself previously ordered the goods to be sold. The judge who tried the cause, Gurney, B., told the jury that the least they could give the plaintiff was the sum he had paid for the goods. On a motion for a new trial, it was insisted that, as the plaintiff had directed the goods to be sold, the sheriff's sale could not damnify him, and the jury should therefore have assessed the damages at the amount which the goods produced, less the expense of the sale. But Alderson, B., said: "It was entirely a question for the jury, what damages they would allow. Juries have not much compassion for trespassers; and I do not think they were bound to weigh in golden scales, how much injury a party has sustained by a trespass."

In another case of trespass *de bonis asportatis*,‡ the plaintiff had purchased goods of the defendant, and owed him £67.

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\* Coolidge vs. Choate, 11 Met., 79.

† Thompson vs. Pettit, 10 Q. B. R., 101.

‡ Gillard vs. Brittan, 8 Mees. & Wels., 575.



The plaintiff went off secretly; the defendant followed him and took off property, to about £50 or £60, which the defendant had previously sold him. The judge who tried the cause, told the jury that in estimating the damages, they might take into consideration all the circumstances of the case, and amongst others the plaintiff's debts to defendant, which would be reduced, *pro tanto*, by the value of the goods taken away. The jury found for the defendant, and on motion for a new trial, the charge was held wrong. "It would lead," said Abinger, C. B., "to this consequence, that a party may set-off a debt due in one case against damages in another." Alderson, B., said: "It is equivalent to allowing a set-off in trespass;" and the rule for a new trial was made absolute.\*

In another case, where a sheriff had wrongfully seized goods which were afterwards taken from him by another wrongdoer, and the plaintiff was compelled to pay a sum of money to extricate them from the possession of the last taker, it was held that he might recover the sum paid in an action against the sheriff, although in nowise connected with the second conversion of the property.† But it appears very severe, to hold a party not actuated by any malicious motive responsible for the independent acts of a third party over whom he has no control.

In case for an illegal distress without the statutory appraisal required, it was intimated that the measure of damages would be the difference between the fair value of the goods and the amount of rent discharged by the proceeds of the sale, but the point was not decided.‡

We have already had occasion to call the reader's attention to the class of cases growing out of trespasses to real estate where personal property is removed. And in these cases a marked effort has been shown to award remuneration according to the motives which actuated the defendant. In a recent

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\* Where trespass was brought for breaking and entering the plaintiff's dwelling-house, and taking away certain goods, not alleging them to be the plaintiff's (plea not guilty by statute), the judge at the trial, having directed the jury to find a verdict for the plaintiff, with nominal damages for the trespass to the house, it was held, on motion to increase the damages, that the plaintiff was not entitled to damages also for the value of the goods, as they were not alleged to be the property of the plaintiff. *Pritchard vs. Long*, 9 Mees. & Wels., 665.

† *Keene vs. Dilke*, 4 Exchequer, 888.

‡ *Wilson vs. Nightingale*, 8 Q. B., 1084.

case in the English Exchequer,\* the circumstances were as follows: The plaintiff and defendant were adjoining proprietors in a coal district. The defendant had worked his coal mine under the plaintiff's land, to an extent exceeding a rood, unintentionally, as is to be inferred, the contrary not being alleged, and had brought up a considerable quantity of coal. Trespass being brought, the defendant supposed the rule of damages to be the value of the coal in the bed, or its market value, less the price of getting it out, and paid into court the sum of £133. But Park, B., who tried the cause, said that the plaintiff would have been entitled in an action of *trover* to the value of the coal as a chattel, either at the pit's mouth, or on the canal bank, if the plaintiff had demanded it at either place, and the defendant had converted it, without allowing the defendant any thing for having worked and brought it there; that not having made such a demand, and this action being trespass, he was entitled to the value of the coal as a chattel at the time when the defendant began to take it away, that is, as soon as it existed as a chattel, which value would be the sale-price at the pit's mouth, after deducting the expenses of carrying the coals from the place in the mine where they were got to the pit's mouth. And the jury adopting the above principle, fixed the value of the coal, when got, at £251 9s. 6d. Leave was given to reduce the verdict (if the court should be of opinion that the proper measure of damages was the value of the coal in the bed, which the jury estimated at £159) to £16, that being the difference between this sum and the amount, £133, paid in by the defendant. But the rule was refused, the court thus affirming the principle laid down at the trial. Lord Abinger said, "It may seem a hardship that the plaintiff should make this extra profit of the coal, but still the rule of law must prevail." Park said, "I am not sorry this rule is adopted; it will tend to prevent trespasses of this kind, which are generally willful."

And the doctrine of this case has been recently recognized.† In a case at nisi prius, where a similar trespass was complained of, Parke, B., told the jury that if there was fraud or negligence on the part of the plaintiff, they might give as damages under one of the counts which was in *trover*, the value of the

\* *Martin vs. Porter*, 5 Mees. & Wels., 802.

† *Morgan vs. Powell*, 8 Q. B. R., 278.

coals at the time they first became chattels, on the principle laid down in *Martin vs. Porter*. But if they thought that the defendant was not guilty of fraud or negligence, but acted fairly and honestly in the full belief that he had a right to do what he did, they might give the fair value of the coals, as if the coal fields had been purchased from the plaintiff; which latter estimate was adopted by the jury.\* The principle to be extracted from these cases is, that in trespass, if the defendant has in good faith increased the value of the property, the plaintiff shall not have the benefit of his labor, and this appears to be the rule in this country. So in Maine, it has been recently held in conformity to these decisions, that in trespass for logs cut by the defendant on the lands of the plaintiff, but in good faith and under an erroneous confidence in his title, the measure of damages was not the value of the logs at a certain landing place to which they had been hauled by the defendant, but their value the moment they were severed from the freehold, when, for the first time they became a chattel, so that trespass would lie for them. It was admitted that the rule in trover was different; but there was said to be a strong equity in not allowing exemplary damages to be recovered against one not conscious of doing wrong when he took the goods of another.†

In an action on the case in Massachusetts, by the inhabitants of Lowell against the Boston and Lowell Rail Road Corporation,‡ it was shown, that the defendants cut across one of the streets in the town of Lowell, and not replacing proper barriers placed there by the town and removed by the defendants, two persons fell into the deep cut and were injured; that the town was sued on its liability to keep the highways in order, and was obliged to pay a large sum of money, double damages, counsel fees, &c. The defendants insisted that the damages claimed were too remote, because the town, according to the Massachusetts statute, was only liable for negligence (on which subject the evidence seems to have been that one of the town's selectmen confided in the promise of the defendant's agent to keep up the barriers); and that, at all events, the R. R. Corporation were

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\* *Wood vs. Morewood*, 8 Q. B. R., 440, *in notis*.

† *Cushing vs. Longfellow*, Maine Reports, Vol. 26, 806. Exemplary is here, of course, used as synonymous with severe, and not as implying vindictive damages.

‡ 28 Pick., 24.

not liable either for double damages or the costs of the prior action against the town; and so the Court held, on the ground that the damages were doubled by reason of the neglect of the town, and that the prior suit was not defended at the request of the defendants (the R. R. Co.), or for their benefit.

So in trespass for taking corn, it will not be permitted the plaintiff to show, that in consequence of the alleged illegal act he was obliged to work as a day laborer to obtain the means to purchase more corn. "Such testimony," says the Supreme Court of Alabama, "would tend to establish a criterion of damages too remote and disconnected with the act done, and would suppose the rule to fluctuate with the poverty of the plaintiff."\*

We come now to consider wrongs done to the person; and of these a very important class comprises injuries to character.

The actions for libel and slander are abundantly treated in the works devoted to those particular subjects.† But it may not be superfluous to notice some of the questions that most frequently present themselves in these proceedings with regard to the subject of relief. A very important line of demarkation exists in actions of slander between those defamatory words which are actionable *per se*, and those where to sustain a suit special damage must be averred. Into this distinction it is not proper here to enter; but it is well to remark with reference to the subject of this treatise, that where the plaintiff undertakes to show special damage by the loss of customers in trade, he ought to state in his declaration the names of such customers,‡ and he cannot prove that any persons not named in his declaration left off dealing with him in consequence of the words spoken.§

In England, in case for words not actionable *per se* and averring special damage, "not guilty" puts in issue not only the speaking of the words but also the special damage alleged.]

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\* *Sims vs. Glazener*, 14 Ala., 695.

† See *supra*, 91, *Ingram vs. Lawson*, 6 Bing. N. C., 212, for what was said by the English C. P. as to damages in an action for libel on a vessel.

‡ *Hartley vs. Herring*, 8 Term., 133.

§ *Hallock vs. Miller*, 2 Barb. S. C. R., 680.

| *Wilby vs. Elston*, 8 Man. Gr. & S., 142.

But the most important questions in these actions relate to the admission or exclusion of evidence with reference to the mitigation or aggravation of damages. Originally in slander, under the plea of the general issue, the defendant might avail himself of any defense. But it was decided in England at an early day,\* that if the defendant intended to justify, he should plead his justification, in order that the plaintiff might know what defense he was to meet. In New York it is well settled, that if the defendant justify he admits the malice, and cannot resort to any defense based upon the absence of malice. So, mitigating circumstances which have a tendency to prove the truth of the charge, cannot be given in evidence under the general issue in diminution of damages; but any circumstances which disprove malice but do not tend to prove the truth of the charge are admissible.†

So where it appears that the defendant was drunk when he uttered the words, this may go in mitigation of damages as tending to rebut malice. But where it is proved that he repeated the charge both when drunk and sober, on public and private occasions, his being drunk at the particular time alleged is no reason for abating the damages.‡ Nor can the defendant prove in mitigation of damages, irritating language addressed to him by the *father* of the plaintiff immediately previous to the uttering of the slanderous words to another person.§

In actions of slander and libel, it has been much discussed how far the fact of the slander or libel complained of being a mere repetition or republication can be set up either in justification or mitigation.|| But the general scope of this work only allows me here to refer to the subject. It is well settled, that if a strict justification is attempted it must be as broad as the accusation. So, it is necessary to justify the aggravating portion as well as the substantial charge.¶ And it has been even held

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\* Underwood *vs.* Parks, Strange, 1200.

† Gilman *vs.* Lowell, 8 Wend., 578. Am. Lead. Cases, 190, and cases there collected.

‡ Howell *vs.* Howell, 10 Iredell N. C., 84.

§ Underhill *vs.* Taylor, 2 Barb. S. C. R., 843.

|| Bennett *vs.* Bennett, 6 Car. & Payne, 589, and cases there cited.

¶ Helsham *vs.* Blackwood, 20 Law J. Rep. (N. S.) C. P., 187; a notice to offer certain facts in evidence which are really of a justificatory character, will not be vitiated by the fact that the notice uses the phrase, in mitigation of damages, instead of justification, as it should. Baker *vs.* Wilkins, 2 Barb. S. C. R., 220.

that an unsuccessful plea of justification was a good ground for increasing the damages. But I think the inclination of the latter cases is against this idea, which in truth leads to an effort to punish what may be a perfectly innocent act. So, in Indiana, in slander for perjury, if the defendant plead the truth of the words in justification, and fail to prove the plea, the filing of that plea is not an aggravation; and on the contrary, if from the evidence it appear that the defendant, though he cannot strictly justify, had reason to believe from the plaintiff's conduct that the charge was true, such fact may go to the jury in mitigation of damages.\*

So, in Tennessee, an invalid and insufficient plea of justification in an action of slander upon which no judgment could have been entered, is entitled to no weight in aggravation of damages under the plea of not guilty.† No damages can be given in slander for any repetition of the defamatory words subsequent to the commencement of the suit. Such repetition may be in some cases shown in order to prove the character of the original transaction and the motives of the defendant, but not with a view to enhancing the damages by obtaining any relief for the new injury.‡

It has been distinctly declared in Louisiana, that no proof of damage is necessary to entitle the plaintiff to recover in actions of libel, and that the pecuniary damage is never the sole rule of assessment.§

It is also necessary to notice the action of slander to title of real estate. We have already had occasion to speak of an action for slander of a vessel. A false statement made maliciously with reference to the title to real estate, is a good cause of action; but the malice cannot be inferred from the falsehood; in order to recover substantial damages they must be proved to have resulted from the false statement;|| and in this action, as in others of a like nature, exemplary damages may be recovered.¶

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\* *Byrket vs. Monohon*, 7 Blackf., 83.

† *Braden vs. Walker*, 8 Humphreys, 84.

‡ *Pearson vs. Lemaitre*, 5 Man. & Gr., 700. *Schoonover vs. Rowe*, 7 Blackf., 202.

§ *Daly vs. Van Benthuyssen*, 8 La. Ann. R., 69.

| *Malachy vs. Soper*, 3 Bing. N. C., 371. *Brook vs. Rawl*, 4 Exch. 521. *Pitt vs. Donovan*, 5 M. & Sel., 689.

¶ *Kendall vs. Stone*, 2 Sandf. S. C., 269.

We turn now to other injuries to the person.

The action of case, by the father or master, for seducing a daughter or female servant, is one of a peculiar character. It is eminently a legal fiction; the demand is based upon the mere loss of service, but the damages are very much at large, and in the discretion of the jury. And, as a general rule, exemplary damages may always be given.\* It is very curious to see how the practice of giving damages beyond the mere value of the service, has grown up. As late as the latter part of the last century, in a case tried before Mr. Justice Chambre, the action being brought by the father for the seduction of his natural daughter, the judge charged the jury that they must consider the female merely in the character of a servant, and award the plaintiff compensation for the loss of service only.† In the year 1800, Lord Eldon, then Chief Justice of the Common Pleas, in an action tried before him, told the jury that they were to look, not merely to the loss of service, but to the *wounded feelings* of the party.‡ In 1805, Lord Ellenborough, in a case before him, told the jury that “damages might be given for the loss which the father sustained by being deprived of the *society* and *comfort* of his child, and by the *dishonor* which he receives.”§ And finally, the same learned judge used this language in the King’s Bench, on a motion to set aside an inquisition in a case of seduction, on the ground of excessive damages. He said, “this proceeding was one *sui generis*, where in estimating the damages, the parental feelings and the feelings of those who stood in *loco parentis*, had always been taken into consideration; and although it was difficult to conceive on what legal principles the damages could be extended ultra the injury arising from the loss of service, yet the practice was now inveterate, and could not be shaken.”¶ “The action for seduction,” says the Supreme Court of New York, “is peculiar, and would seem to form an exception to the rule that actual damages only can be recovered when the action is for loss of service consequential on a direct injury; but

\* *Ingersoll vs. Jones*, 5 Barb. S. C. R., 661. *Irvin vs. Dearman*, 11 East, 23. *Edmonson vs. Machell*, 2 T. R., 4.

† *Selwyn’s Nisi Prius*, 5th Ed., 1075.

‡ See note to *Andrews vs. Askey*, 8 Car. & P., 7; Eng. C. L. R., 270.

§ See same note.

¶ *Irving vs. Dearman*, 11 East, 23.

there the party directly injured cannot sustain an action, and the rule of damages has always been considered as founded upon special reasons only applicable to it.”\* In a case brought by the mother, in 1837, *Tindal*, Chief Justice of the English Common Pleas, directed the jury that they might give damages for the *distress* and *anxiety* of the plaintiff.† As to the right of recovery, however, the English cases adhere to the original idea on which the action is founded. So, if there is no proof of loss of service whatever, there can be no relief.‡ So, although the defendant be guilty of the seduction, but the jury are of opinion that the child is not his, the plaintiff cannot recover.§ In other words, without some damage to the plaintiff or master, occasioned by the illness of the female, and resulting from the illicit intercourse, the plaintiff is without relief.

In this country, however, there seems to be an inclination to push the redress further. Thus, in North Carolina, it has been held that an action on the case for seduction might be maintained before the delivery, and it was said that the law would be the same had there been no pregnancy.¶ So in this country, the English rule requiring proof of actual service having been relaxed, and it is only necessary to show that the parent has the legal right to command the services of the child,¶ and very slight evidence of loss of service will suffice.\*\* But the action cannot be maintained by a step-father,†† It is also proper to bear in mind in relation to this action, that criminal connection may take place without seduction, and that if seduction be not proved, damages for it should not be given.‡‡

Where the jury were directed, or supposed they were directed, that damages might be given for bringing up the child, the fruit of the illicit connection, the Supreme Court of

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\* *Whitney vs. Hitchcock*, 4 Denio, 461.

† *Andrews vs. Askey*, 8 Car. & Payne, 7.

‡ *Grinnell vs. Wells*, 7 Man. & Gr., 1088.

§ *Eager vs. Greenwood*, 1 Exch., 61.

¶ *Briggs vs. Evans*, 5 Iredell, 16. See, also, *Hewett vs. Prime*, 21 Wend., 79.

¶ *Bartley vs. Richtmayer*, 4 Comstock, 88, where the cases are collected.

\*\* *Villepigne vs. Shuler*, 8 Strobbart, 462.

†† *Roberts vs. Connelly*, 14 Ala., 289. *Lowth vs. Denniston*, 2 Watts, 474. In both of these cases, the case of *Sargent vs. —*, 5 Cow., 106, has been denied to be law so far as it admitted the right of the plaintiff to recover. See, also, in Indiana, *Boyd vs. Bird*, 8 Blackford, 118.

‡‡ *Hill vs. Wilson*, 8 Blackford, 128.



New York granted a new trial, on the ground that the plaintiff, the master, was under "no legal obligation to support and educate the child; that he could not be compelled to appropriate the proceeds of the verdict to that purpose; and that the verdict would not afford the defendant any exemption from his liability to provide for the child when called on in the regular course of the law." This, in effect, declares that the damages are to be measured by strict legal rules, or at least asserts the principle I have above stated, that even in cases of aggravation, where it appears that the jury did not intend to give vindictive, but only compensatory damages, and on that point were wrongly instructed, such course will be taken as to restrict the compensation within legal limits.\*

So, also, it is well settled that in this action no evidence can be given as to any promise of marriage, either with reference to the right of action or measure of damages; the remedy for the breach of that contract belonging to the female in her own name. Thus, in the King's Bench, Lord Ellenborough said, "the daughter may be asked whether the defendant paid his addresses in an honorable way; further than that you can on no account go."†

So in New York, in such a case, it has been held incorrect to admit this description of evidence, whether the judge instructs the jury that they may give damages for the seduction, and also for the breach of the promise, or whether he admits it only to prove the seduction, but not to enhance the damages.‡ Nor can an offer to marry the female be given in evidence to mitigate the damages.§

In actions for criminal conversation, it has been held that the amount of reparation is in no sense to be measured by the defendant's property; and evidence that the defendant is a man of large fortune is therefore inadmissible. But this is not so in actions for breach of promise of marriage, where the amount of the defendant's property is material, as going to show what should

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\* *Sargent vs. —*, 5 Cow., 106. See, also, *Edmonson vs. Machell*, 2 T. R., 4.

† *Dodd vs. Norris*, 8 Camp., 519. See, also, *Tullidge vs. Wade*, 3 Wils., 13.

‡ *Foster vs. Scofield*, 1 J. R., 299. *Clark vs. Fitch*, 2 Wend., 464. *Gillett vs. Mead*, 7 Wend., 198. See, also, *Brownell vs. McEwen*, 5 Denio, 367, and *Wells vs. Padgett*, 8 Barb. S. C. R., 323.

§ *Ingersoll vs. Jones*, 5 Barb. S. C. R., 361.

have been the station of the plaintiff in society if the promise had not been broken.\*

In the action for enticing a servant from his employment, the same effort to limit the relief to compensatory damages has been exhibited. In an early case it was said that the general rule of damages is the value of the servant's time, during the period he was in the defendant's employment; but that in cases of aggravation, the jury may give the whole value of the servant.† This, however, refers rather to slaves than servants. In a case of this kind in Illinois, for enticing a registered servant, it was held that the plaintiff was entitled to recover the value of the services lost up to the time of the commencement of the suit, the reasonable expenses necessarily incurred in getting the servant back again, and damages for the loss of time, trouble and injury sustained until the commencement of the suit; and that if the plaintiff lost the entire service in consequence of the defendant's act, then he was entitled to the value of the term of service.‡

In an action on the case for enticing the plaintiff's servants, who were not hired by the plaintiff for a limited or constant period, but worked by the piece, by inviting them to dinner, and inducing them to sign an agreement not to work for him; it being proved that the plaintiff, a piano-forte maker, realized about £800 per annum by the sale of his instruments, the jury found a verdict for £1,600. The plaintiff was nearly, if not absolutely ruined. On a motion for a new trial, it was insisted, that, as the men worked by the piece, each of them was justified in leaving the plaintiff when he had completed the work in hand; and that in point of fact, the plaintiff could only be entitled to recover damages for the half-day for which his workmen accepted the defendant's invitation. The court refused to interfere, on the ground that the damages were excessive; and Richardson, J., said, "The measure of damages he is entitled to receive from the defendant is not necessarily to be confined to the servants he might have in his employ at the time they were so enticed, or for that part of the day on which they absented themselves from his service, but he is entitled

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\* James vs. Beddington, 6 Car. & P., 589.

† Dubois vs. Allen, Anthon's N. P., 94.

‡ Hays vs. Borders, 1 Gilman, 46.

to recover damages for the loss he sustained by their leaving him at that critical period.”\*

So, again, in trespass for taking the plaintiff's goods in execution under a warrant of attorney and judgment, which were afterwards set aside as illegal, it has been recently held in the English Queen's Bench that the plaintiff cannot claim as part of the damage, his costs incurred in vacating the warrant of attorney and judgment; Lord Denman saying, “the plaintiff might have recovered these costs in a proper form of proceeding, but he cannot sue the defendant for a trespass *per quod* he was put to expense in removing the cause of the trespass.”†

There is a class of cases nearly connected with these, in which I do not find that any rule has been declared distinctly; it is where the parent sues for personal injury to the child, without actual malice or other aggravating circumstances, as for instance, an action against a railroad or steamboat, for collision or explosion. Here it may, perhaps, be said, on one hand, that injury to the person resulting from negligence, is a good ground to infer malice; but, on the other, the action is based on the loss of service alone, and the question is, what has the plaintiff lost in the services of the servant. And the analogy of the action for seduction does not appear to hold good; because there is no pretence of intention to injure, and no interest of public morals to vindicate. The question is embarrassing, and I cannot but believe that the embarrassment results from placing the claim on a false basis, *i. e.*, the loss of service.

We have had occasion, in regard to actions on contract, to discuss the subject of Recoupment and Set-off. The doctrine of mitigation, to which we have already incidentally referred, is of an analogous character in regard to actions of tort.

The general rule is that any thing which is a complete answer to the action must be pleaded either in bar or in justification; but it is also well settled in many cases that matters which go to the quantum of damages merely, to palliate the character of the offense, or to *mitigate* the amount which the jury may award, may be given in evidence under the general issue.

One of the simplest forms of mitigatory evidence comes

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\* Gunter *vs.* Astor, 4 Moore, 12.

† Holloway *vs.* Turner, 6 Q. B. R., 928.

under the head of provocation. "In actions for personal wrongs and injuries," says Lord Abinger,\* at nisi prius, "a defendant who does not deny that the verdict must pass against him, may give evidence to show that the plaintiff in some degree brought the thing upon himself."

So in an action for libel, the defendant may give in evidence other libels recently published before by the plaintiff of the defendant.† So in an action for assault and battery, a libel published by the plaintiff on the defendant, may be given in evidence in mitigation of damages, even though it be at the time the subject of a cross action; but that being so, the defendant ought not to derive much advantage from it in mitigating the damages.‡

So in an action of *criminal conversation*, which is founded on the loss of the comfort, fellowship, and assistance of the wife, it is competent to show, in mitigation of damages, that the plaintiff's wife was an actress; that he concealed his marriage from his wife's mother, and very seldom saw his wife, but suffered his wife to remain living with her mother as if she were a single woman, and allowed her to continue her theatrical performances in her maiden name.§

As to mitigation in trespass, it has been held in the State of Pennsylvania, that in an action for pulling down a building, evidence that the building was peaceably taken down, and its materials preserved in conformity with the directions of the commissioners of the township, during a period of great public excitement and disorder, with a view of saving the neighborhood from threatened violence, is admissible in mitigation of damages.

But in such action, evidence that the commissioners had by law the power to abate and remove nuisances, and that a grand jury, after instructions by a competent court, presented the building as a public nuisance and recommended its abatement, is not admissible in mitigation of damages.¶

The general rule in regard to personal property is that its

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\* *Fraser vs. Berkely*, 7 Carr. & Payne, 621.

† *Watts vs. Fraser*, 7 Carr. & Payne, 869.

‡ *Fraser vs. Berkely*, 7 Carr. & Payne, 621.

§ *Calcraft vs. Earl of Harborough*, 4 Carr. & Payne, 490.

¶ *Reed vs. Bias*, 8 Watts & Serg., 189.

return is no bar to an action, but is admissible in mitigation of damages.\* And such we have already seen to be the law in regard to the action of trover.† For the same reason as in that action, therefore, if the property has been returned without injury to the plaintiff before action brought, he can only recover nominal damages; and if special damage intermediate the trespass and the return is demanded, it would seem that it should be specially alleged.‡ So in *Massachusetts*, where the plaintiff, before suit, demanded the goods, and the defendant promised to return them, but they were attached on a writ against the plaintiff while the defendant was preparing to return them, the measure of damages has been held to be the same that it would have been if the defendant had returned the goods.§ So, on the same principle, it has been held in the same State, that the defendant may prove in mitigation, that the goods did not belong to the plaintiff, and that they have gone to the use of the true owner.||

I think that the principle of these decisions has been carried quite far enough. It is of importance to draw the line between good and bad faith: where the party acts with pure motives, and endeavors as soon as possible to repair his mistake, it may be very proper to construe his conduct favorably; but it will not do to permit acts of willful or wanton trespass to be excused by the defense of outstanding titles in third persons. It would lead directly to that reckless interference with the property of others which the law always sedulously seeks to prevent. This distinction is well laid down in a case in *New York*, where it was held that where property tortiously taken by one person from the possession of another, is subsequently levied upon, whilst in the hands of the tort feazor, by a third person, under a warrant of distress for rent due by the owner, such last taking may be shown in mitigation of damages in an action by the owner against the tort feazor, *if the latter took the property under an*

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\* 6 Bac. Abr., 628; *Vosburgh vs. Welch*, 11 J. R., 175; *Gibbs vs. Chase*, 10 Mass., 125; *Hammer vs. Wilsey*, 17 Wend., 91.

† *Supra*, 492, and cases there cited.

‡ *Moon vs. Raphael*, 2 Bing. N. C., 810.

§ *Kaley vs. Shed*, 10 Met., 817.

|| *Squire vs. Hollenbach*, 9 Pick., 551. *City of Lowell vs. Parker*, 10 Met., 309.

*honest belief that he had a title to it, and not for the purpose of subjecting it to the landlord's warrant.\**

And so in Pennsylvania, it has been held that a sheriff who has wrongfully levied on and sold the goods of the plaintiff will not be permitted to give in evidence, in mitigation of damages, that he has voluntarily applied part of the proceeds of the sale to the payment of a debt of the plaintiff, the court saying, "It is the naked case of a voluntary payment out of the proceeds of a debtor's property, wrongfully converted, but not at the debtor's special instance and request. Every one has a right to adjust his own liabilities, and no one has a right to make another his debtor by interference with his affairs."†

Where the goods taken are inclosed in boxes, the mere opening of the boxes subsequently by the owner, to enable a witness to appraise the value of the goods, is not such a resumption of the property as will justify a mitigation of damages.‡

The character of the property may be such that the law will not give it any protection at all, or at best a partial one. In an action of trespass for cutting and destroying a picture, it appeared that it was a valuable painting, but it also appeared that it was a gross libel on the defendant's sister; and Lord Ellenborough told the jury that they must only award the value of the canvas and paint which formed its component parts.§

So, where trespass was brought against officers of the customs for taking a port-folio and drawings, it has been held by the King's Bench, that the defendant may justify by showing that the port-folio contained drawings liable to seizure for non-payment of duty, which the plaintiff was in the act of carrying ashore out of a foreign packet. The jury found one farthing damages. On this the plaintiffs were non-suited, and the court refused liberty to enter a verdict for the amount found.||

We have already partially discussed the action for malicious prosecution.¶ Where partners sue for torts committed on them as a firm, as in cases of libel or malicious prosecution,

\* *Higgins vs. Whitney*, 24 Wend., 879. *Otis vs. Jones*, 21 Wend., 894.

† *McMichael vs. Mason*, 18 Penn. State R., 214; and, *Dallam vs. Fildam*, 6 W. & S., 288.

‡ *Connah vs. Hale*, 28 Wend., 462.

§ *Du Bost vs. Beresford*, 2 Camp., 510. See, also, *Davis vs. Nest*, 6 Car. & P., 167.

|| *De Gondouin vs. Lewis*, 10 Adol. & Ellis, 117.

¶ *Supra*, 96.

it is well settled that no damages can be given for any injury to the private feelings of the plaintiffs. The act complained of must affect the joint business or trade of the copartnership.\* And in Alabama, it has been decided that in an action for wrongfully and vexatiously suing out an attachment auxiliary to the main suit, to enable the plaintiff to obtain a lien on property for the satisfaction of whatever judgment he might recover, the costs incurred in defending the original suit constitute no part of the plaintiff's damages;† but the counsel fees in the suit may be proven and considered by the jury.‡ And in this action evidence of the plaintiff's profits, alleged to be lost by injury to his credit, has been admitted, not as a measure of damages but as an ingredient in the cause, or to guide the discretion of the jury.§

In the same State, on the issuing of an attachment, the plaintiff gives bond to pay the defendant "such damages as he may sustain by the wrongful or vexatious suing out of the attachment." On these bonds it has been held that if the attachment be *wrongfully* sued out, only the actual damage can be recovered; but if both wrongfully and maliciously, then the party may have vindictive damages.¶

Akin to malicious prosecutions, though not identical with them, are unauthorized suits brought in the name of a party without his direction or consent. The action is in this case a groundless proceeding, irrespective of any merits it might have had if legitimately brought. The person so acting without authority, is liable to make good the damage sustained; and it has been said that though the person in whose name it is brought would have had a right to maintain it, this circumstance will afford no reason for reducing the damages.¶

We turn now to other trespasses. It appears that at common law, and independently of statutory provision, the death of a human being is not the ground of an action for damages. In a case where a plaintiff brought an action against the pro-

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\* Haythorn *vs.* Lawson, 3 Car. & P., 196. See an elaborate and able exposition of this subject by the Supreme Court of Alabama, in Donnell *vs.* Jones, 18 Alaba., N. S., 490, 509. See this last case again, 17 Ala., 688.

† White *vs.* Wyley, 17 Ala., 167.

‡ Marshall *vs.* Betner, 17 Ala., 888.

§ Donnell *vs.* Jones, 17 Ala., 688.

¶ Sharpe *vs.* Hunter, 16 Ala., 765.

¶ Foster *vs.* Dow, 20 Maine, 442.

prietors of a stage-coach for negligent driving, by which his wife was killed, Lord Ellenborough said that, "in a civil court, the death of a human being cannot be complained of as an injury."\* And so it has been held in Massachusetts, in a case where a widow sued a railroad company for negligence, by which her husband had been killed.†

In New York, in an action on the case‡ for negligently running over and killing the plaintiff's son, a lad of ten years of age, the judge charged that the plaintiff was entitled to recover such sum by way of damages as they should be of opinion the services of the child would have been worth until he became twenty-one years of age. The case was carried up, but no question seems to have been distinctly made as to the correctness of this direction. And in a subsequent case in the same State, where the plaintiff's infant child died within an hour and a half after the injury, Bronson, J., delivering the opinion of the Court of Appeals, said, "I have a strong impression that the father could recover nothing on account of the injury to the child beyond the physician's bill and funeral expenses;" but the point was not decided.§

The remissness of the common law in this respect has been cured by various statutes. In England, the 9 and 10 Vict., c. 93, provides that whenever the death of a person shall be caused by a wrongful act, and which would, if death had not ensued, have entitled the party injured to maintain an action, the party offending shall be liable notwithstanding the death. So in Massachusetts,|| if the life of any passenger is lost by the negligence, &c., of the proprietors of a railroad, &c., or of their servants, the proprietors shall be liable to a fine not exceeding five thousand dollars nor less than five hundred dollars, to be recovered by indictment for the benefit of the widow and heirs.

And in New York a statute¶ provides, that whenever the death of any person shall be caused by any wrongful act or neglect, the party who would have been liable if death had not ensued, shall be liable to an action for damages, notwith-

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\* *Baker vs. Bolton*, 1 Camp., 493.

† *Carey and wife vs. Berkshire R. R. Co.*, 1 Cushing, 475.

‡ *Ford vs. Monroe*, 20 Wend., 210.

§ *Park vs. Mayor of N. Y.*, 3 Comstock, 439.

|| Stat. of 1840, c. 80.

¶ Passed 13th Dec'r, 1847. Laws of 1847, Ch. 450.



standing the death of the party injured, and although the act be felonious. This statute is taken from the English statute\* above cited, commonly known as Lord Campbell's act; and the second section provides that the action is to be brought by the personal representatives of the deceased, and "that in every such action the jury may give such damages as they shall deem fair and just with reference to the pecuniary injury resulting from such death, to the wife and next of kin of such deceased person." I suppose that under this act the jury are not intended to give vindictive or exemplary damages. But the language leaves the subject largely in their power.†

In England it has been held, that the rule of the common law is applicable to this statute; that the action is to be treated as if the injured party had brought it; and that if his negligence contributed to the disaster the plaintiff cannot recover.‡

In regard to personal trespasses generally, they are so frequently accompanied by circumstances of aggravation that the question of strict compensation is rarely raised. But even in this class of cases we find the same effort to restrict the relief within legal limits.

So in New York, it has been held that evidence of the value of the services of an attorney, in getting rid of an illegal arrest, is not admissible in an action of false imprisonment brought for such arrest, where such expenses are not specially laid in the declaration; expenses thus incurred not being the legal and natural consequences of the act complained of.§ And an action of trespass being brought for false imprisonment, and a plea that the defendant had committed a felony being put in; it was held not to be a misdirection, that the judge told the jury that the putting of such a plea on the record was a persisting in the charge contained in it, and was to be taken into account by them in estimating the damages.||

In an action of false imprisonment, the defendant had given the plaintiff into custody on a charge of felony. The magistrate heard the charge and remanded the prisoner. It subsequently

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\* 9 & 10 Vict., cap. 98.

† See Smith, Adm'x, *vs.* London & N. W. R. Co., Code Reporter for Sept., 1848, 82, in English Exchequer.

‡ Tucker *vs.* Chaplin, 2 Car. & Kir, 730.

§ Strang *vs.* Whitehead, 12 Wend., 64.

|| Warwick *vs.* Foulkes, 12 Mees. & Wels., 507.

appearing that the charge had been made under a mistake, the plaintiff was released. The declaration charged the first arrest and the remand as distinct acts of trespass, and damages were given for both, although the latter was the act of the magistrate, on the ground that the wrongdoer was responsible for it as the consequence of his wrongful act; but it was held erroneous, and a new trial was granted on the ground that the defendant was not responsible for the act of the magistrate.\*

Where the butler of a London club brought his action against an architect, employed to do repairs on the club-house, and his agents, and averred that they put in gas so negligently that it exploded, and crippled the plaintiff for life, and he was discharged for incapacity to do the duties of his place, it was insisted for the plaintiff that the measure of damages was the amount of money which would be required to purchase an annuity for the plaintiff adequate to the sum which he was receiving from the club; but Lord Abinger ruled otherwise; and after commenting on the fact that neither party was in actual fault, said, "If it be asked that the jury are to give damages equal to an annuity, it may be demanded, what right has the plaintiff to calculate that he would have continued in office to the end of his life. I think it would be absurd to make the value of the annuity the measure of damages."†

We have already discussed the question, whether even in actions on the case for negligence, counsel fees can be estimated in the damages.‡

In trespass for assault on the child or servant of plaintiff, the ground of action being the loss of service, the measure of damages is the actual loss which the plaintiff has sustained, and if illness follows the expenses attending such illness, but exemplary damages cannot be recovered. These last are only given to the injured child or servant, if he brings his action in his own name.§ This has been recently so held in New York, in regard

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\* Lock *vs.* Ashton, 12 Q. B. R., 871.

† Rapson *vs.* Cubitt, 1 Car. & Marsh, 64. I find an analogous case to this in the Scotch books. In Lever *vs.* Torry, action for defamation, in consequence of which the plaintiff was removed from his office, which was one dependent on the will of his superiors, it was held that the jury must take into consideration both the nature and tenure of the office, and not give the value of an annuity certain. 1 Murray, 850, 894.

‡ Lincoln *vs.* Saratoga and Sch'y R. R., 28 Wend., 425; *supra*, 98 and 101.

§ Whitney *vs.* Hitchcock, 4 Denio, 461.

to an assault, and on technical reasoning appears just ; but if this doctrine be applied to cases of seduction, the remedy for that outrage, already but too imperfect, will be deprived of the only efficiency it possesses. Nor is it improper in this connection to call attention again to the great incongruity and injustice resulting from the adoption of technical forms of action, and which in fact make legal rights depend on mere legal technicalities. The Supreme Court of New York appear to have been pressed by this difficulty in the case in question ; for they say, in language already cited, "The action for seduction is peculiar, and would seem to form an exception to the rule that actual damages only can be recovered when the action is for loss of service consequential upon a direct injury ; but there the party directly injured cannot sustain an action, and the rule of damages has always been considered as founded on special reasons only applicable to that case." It has been intimated that neither in actions of this description, nor for frauds, can damages be allowed for injury to feelings or reputation.\* In an action brought by a father for an assault on a son, *per quod servitium amisit*, the judge who tried the cause having charged that the jury in making up their verdict, might take into account the feelings of the parent, a new trial was ordered, on the ground that the suit being for loss of service, and the child also having a right of action against the defendant, the direction was wrong. But in cases proper for exemplary damages, I suppose no such line as this can practically be drawn.

In Massachusetts, it has been held that under the provisions of their statute,† by which towns are made liable for injuries sustained by not keeping roads or bridges in repair, no damage can be given for fright or mental suffering resulting from mere risk or peril ; but where an actual injury has been sustained, however small, attended by mental suffering, the jury can take that mental suffering into their estimate.‡ It is evident that the inquiry here becomes of a very metaphysical character.

In Virginia, the action in use for the recovery of the freedom of persons alleged to be slaves, is trespass *vi et armis*, for assault and battery, and false imprisonment. But the object is

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\* *Richards vs. Farnham*, 18 Pick., 451.

† Rev. Stat., c. 25, § 22.

‡ *Canning vs. Williamstown*, 1 Cushing, 451.

simply to remove the claimant from the *status* of slavery to that of freedom. The form is fictitious, and the damages nominal; nor can the persons so held recover the profits of their labor for the time that they were illegally held in slavery, even though it was done with a full knowledge of their right to be free, and although the suit was protracted on frivolous pretexts.\* In Louisiana, one held in slavery by a person who purchased him in good faith, believing him to be a slave, may recover against the latter wages for the time of his confinement in jail during the suit for freedom, with a fair allowance in addition as damages for the imprisonment, but no damages or wages will be allowed for any period anterior to the institution of the suit.†

As to mitigation in actions for personal trespass, it has been held in Pennsylvania, that in trespass against a constable for arresting and imprisoning the plaintiff on suspicion of a felony, the bad character of the plaintiff cannot be given in evidence in mitigation of damages.‡

In an action of assault and battery, the defendant cannot give in evidence the general bad character of the plaintiff, but he may show the conduct, and even character, of the plaintiff, when they form the provocation and inducement to the particular trespass.§ The defendant cannot give in evidence, in mitigation of damages, the acts or declarations of the plaintiff at a different time, or any antecedent facts which are not fairly to be considered as part of one and the same transaction, though they may have been ever so irritating or provoking.||

The provocation, to entitle it to be given in evidence in mitigation of damages, must be so recent and immediate as to induce a presumption that the violence done was committed under the immediate influence of the feelings and passions excited by it.

An admission by the counsel for the plaintiff at the trial of an action of trespass, that the defendant acted without malice, precludes the plaintiff from claiming vindictive damages, and

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\* *Peter vs. Hargrave*, 5 Grattan, 12.

† *Coby vs. Kock*, 8 La. Ann. R., 439.

‡ *Russell vs. Shuster*, 8 Watts. & Serg., 308.

§ *Rhodes vs. Bunch*, 8 McCord, 66. *McKenzie vs. Allen*, 8 Strobbart, 546.

|| *Lee vs. Woolsey*, 19 J. R., 819.

therefore evidence on the part of the defendant, in the nature of a justification, is inadmissible by way of mitigation.\* It is proper here to notice the rule, that one of several joint trespassers who is compelled to pay damages cannot compel his co-trespassers to contribute.†

The power of the court over the measure of relief is constantly exercised, even in cases of fraud. This is invariably so as to remote and consequential damages. The rules in this respect we have already considered, and they are uniformly applied in cases of fraud as well as all others. So, in a case in England, where the defendant was sued for false representations in regard to the credit of his son, where it appeared that the plaintiffs had trusted the son for a length of time, and to an amount which might be considered ill-judged and excessive, even if the representations had been true. Tindal, C. J., charged the jury: "As to the damages, the verdict must be for such damage as is justly and immediately referrible to the falsehood of the statement. The goods first purchased have been paid for, but six hundred pounds' worth since have not, and the son was made a bankrupt by the plaintiff in the month of October. You must say how much of this is justly and immediately referrible to the false statement. That is a problem which you must solve for yourselves. I will only make an observation, and that is if they give the son an indiscreet and ill-judging verdict, they cannot in fairness call on the father to be answerable for the loss occasioned by it."‡ The language of the eminent judge is particularly deserving of notice; for if, in cases of this kind, the principles that exclude remote damages are not adhered to, the whole subject of remuneration would be in the hands of the jury. So, where§ case was brought for fraud and deceit in the sale of a vessel, which was represented to be British, whereas in fact she was Spanish, Story, J., before whom the cause was tried, held the rule of damages to be the difference between the value of the vessel if she had been what she was represented to be and her actual value, together with such part of the costs of repairs laid

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\* Hoyt *vs.* Gelston, 18 J. R., 141; S. C. in error, *ib.*, 561.

† Acheson *vs.* Miller, 18 Ohio, 1.

‡ Corbett *vs.* Brown, 5 Car. & P., 368.

§ Sherwood *vs.* Sutton, 5 Mason, 1.

out on her, on faith of the false representations, as the jury should see fit to allow. He said :

"The true rule of damages in cases of this nature is, to allow the difference between the value of the vessel, if her real character had been known, and the price at which she was bought, under the faith of her being a vessel entitled *bona fide* to the privileges and benefits of such a *British* character. To this extent at least, he has sustained a loss. Now it is in proof, that as a *Spanish* vessel, at the time of the purchase, she was not worth more than 500 dollars, that is, than the value of her materials if she were broken up. As a *British* vessel she was worth 1500 dollars, and on the faith of the representation made of her possessing such character, the plaintiff gave that sum for her. The difference between these sums is a loss actually sustained by the plaintiff; for he had paid 1000 dollars more for the vessel than she was worth, and that upon a false representation of the defendant. But it further appears, that upon the faith of this representation the plaintiff went on and expended about 1900 dollars in repairs; and I am of opinion that of this sum the jury are at liberty to allow the plaintiff such portion as they deem reasonable, to remunerate any loss for which the plaintiff has not received any indemnity or compensation by the subsequent earnings of the ship or otherwise; for the loss was a direct consequence of the fraudulent representation."

And it has been held in Massachusetts, in an action on the case, where the defendant being part owner of a vessel, by fraudulent representations persuaded the attorney of the plaintiff, during his absence, to sell him the vessel at a less price than its value, and afterward himself sold it for a greater price, that if the latter sale was an actual sale, the sum realized at it would be the proper measure of damages; "because it would be unjust to permit the fraudulent party to retain the fruits of his fraud," and because the plaintiff, if not deceived, might have obtained the larger sum; but the court allowed the defendants to show that the price which they paid was the true and full value of the plaintiff's share, both in order to disprove the fraud, and as proper for the consideration of the jury on the question of damages.\*

So in Connecticut, in an action against the vendor of a horse for false representations, the plaintiff cannot recover the expenses of keeping, previous to an offer to return the horse.†

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\* *Matthews vs. Bliss*, 22 Pick., 48. This decision would appear to assume that the object of the jury was merely to give compensatory damages, because, as we have already said, fraud is frequently a case for vindictive or exemplary damages; unless, perhaps, in Massachusetts.

† *West vs. Anderson*, 9 Conn., 107.

At common law there was a writ of conspiracy, which strictly only lay where the conspiracy was to indict the party either of treason or felony, by which his life was in danger. There is also a well known action on the case of similar character but wider scope. In this, as also in the action for fraud, the damage is the gist of the action; fraud and damage must concur to give an action; and by damage is meant legal damage. And so, where a conspiracy had been formed to induce a testator by fraudulent representations, to revoke his will devising certain property to the plaintiff, it was held that no *right* of the intended devisee having been interfered with, he could not maintain an action.\*

In Kentucky, where suit was brought for fraud in assigning a note for which the plaintiff had given certain property, the court held that the value of the property, and not the amount of the note, was the proper measure of damages, though they considered "the precise amount to be recovered by the plaintiff a matter for the consideration and decision of the jury."†

In the same State, in an action on the case, for fraud in regard to the title of a slave sold, the Court of Appeals said,

"This is an action on the case for fraud, and the criterion of damages is in such cases in a great measure left to the judgment of the jury. The law no doubt requires that the compensation in damages should equal the injury occasioned by the fraud, and that injury was equal to the value of the slave lost, and the price agreed to be given was no doubt strong evidence of that value. But to decide that interest should be given on that value as a matter of law, was fixing a criterion which trameled the discretion of the jury, who might give or withhold it, as to them should seem equitable. If the plaintiff in this instance had elected to bring *assumpsit* for the money paid, or to treat the sale as a nullity, he would not, according to the best authorities, have been entitled to the interest thereon as a matter of law."‡

The same general principle also prevails where fraud is involved in the sale of lands.

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\* *Hutchins vs. Hutchins*, 7 Hill, 104. See, also, *Saville vs. Roberts*, 1 Lord Raym., 874. S. C., 12 Mod., 208. 1 Salk., 18. *Skinner vs. Gunton*, 1 Saund., 238. *Jones vs. Baker*, 7 Cowen, 445.

† *Crews vs. Dabney*, 1 Little's R., 278.

‡ *Jackson, Ex'r. vs. Holliday, Adm'r*, 8 Monroe, 368. See, also, in New York, *Voorhees vs. Earl*, 2 Hill, 288, as to fraud in sale of chattels. See a case in South Carolina, where the action was for fraud in selling a note, as good, which had been paid. *Spikes vs. English*, 4 Strobbart, 84.

The subject of fraud in the sale of chattels we have already examined.\*

In a recent case in New York, the Court of Appeals said: "The measure of damages in an action upon a warranty, and for fraud in the sale of personal property, are the same. In either case they are determined by the difference in value between the article sold and what it should be, according to the warranty or representation." The same rule, I apprehend, holds upon the sale of real estate where the action is for deceit.†

It is well settled, that where, previous to or at the time of the conveyance, the vendor makes material representations in regard to the character of the property, which are known by him to be false,‡ he is liable in an action on the case for the deceit. And the grantee is not confined to his remedy on the covenants in the conveyance. This applies, however, only to cases of fraud, and not to those where the seller merely warmly recommends his property. These are governed by the maxim of the civil law, *simplex commendatio non obligat*.§

So| in New York, where the defendant, a public officer, fraudulently misrepresented certain premises as free from incumbrance.

So,¶ where a false representation was made as to the amount for which the property rented. So,\*\* where the vendor of a public house during the treaty, made false representations as to the amount of business done. And the principle has been since again affirmed in England.††

It had been doubted for some time whether fraudulent representations as to the title to land, would give an action, but

\* Supra, 295.

† Whitney vs. Allaire, 1 Comstock, 305.

‡ In Alabama it is not necessary to prove that the vendor knew the representation to be false when he made it. Monroe vs. Pritchett, 16 Ala., 785. But in that State, where the vendee has accepted a deed with covenants of warranty, neither fraud nor failure of consideration is a good defense to a note given for the purchase money. Patton vs. England, 15 Ala., 69. See in that State, also, Capshaw vs. Fannell, 12 Alabama, 780.

§ Taylor vs. Fleet, 4 Barb. S. C. R., 95.

| Culver vs. Avery, 7 Wendell, 381.

¶ Lysney vs. Selby, 2 L. Raym., 1118.

\*\* Dobell vs. Stevens, 3 Barn. & Cress., 623.

†† Early vs. Garret & Lankester, 9 Barn. & Cress., 923.



that seems now, in New York, at least, put at rest, since the case just cited.\*

And so† as to false representations regarding either the location or the cost of land conveyed. And in this latter case it was held that to an action of covenant to recover the price of land, such fraud on the part of the vendor's agent, might be set up as a defense.

The question as to the rule of damages in actions of this kind, was discussed in New York in an action of debt on bond, given for the purchase money of land.‡ The bond was dated in 1836. The action was tried six years later. The defendant offered to prove, that previous to the execution of the bond, the plaintiff had made various false representations in regard to the land in question,—viz., that he had given, or was to give, \$32,000, whereas, in truth, he paid but \$16,000; that it was graded, and suitable for building lots, whereas it was altogether uneven, and unfitted for the object in view,—and that the plaintiff well knew the condition of the land, but that the defendant was ignorant of it. This evidence, which was offered as well to diminish the amount of recovery, as in bar of the action, was rejected, and the plaintiff had a verdict for the amount claimed. Upon argument, the court held, that after entire performance of a contract of sale, the vendee retaining the property, he could not set up fraudulent representations of the vendor, in bar of the action, and that so far the rejection of the evidence was right. But it was further held, that under such circumstances the vendee could recoup the damages which he had actually sustained by the fraud, and that this could be done in an action upon a sealed,§ as well as an unsealed instrument, and whether it went to defeat the recovery in whole or in part. The Court went on to say,

“ If the jury shall find the fraud, the question is then asked, how shall the defendant's damages be ascertained ? As the land, whether the representations were true or false, was in reality worth only a small part of the price which the defendant agreed to pay, there may be some difficulty in answering the

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\* See, also, *Whitney vs. Allaire*, supra. p. 559.

† *Sandford vs. Handy*, 28 Wend., 260.

‡ *Van Eps vs. Harrison*, 5 Hill, 68.

§ 2 Revised Statutes, 406, § 77.

question. But it may, I think, be solved. We must not go back to the date of the contract for the price, and then come down to the present day for the actual value of the land, and charge the plaintiff with the difference. The defendant must bear the consequences of the prevailing delusion about prices and new towns under which the purchase was made. On the other hand, the plaintiff cannot say that his fraud has worked no injury, because every body has now found out that the land never was worth any thing for the purpose of building a town upon it.\* The cause must, as far as practicable, be tried just as it would have been tried the day after the contract was made, if the question had arisen at that time. The jury must assume, what the parties then believed, that the land was valuable as the site for a town, and then inquire how much less the land was worth for building purposes, taking the surface as it actually existed, than it would have been worth for those purposes, had the plaintiff's representation concerning the surface been true. One mode of arriving at the correct result, and perhaps the only one, would be to inquire into the probable expense of reducing and conforming the surface of the ground to a condition corresponding with the plaintiff's representation. This would, I think, give the correct rule of damages; but in the present stage of the cause, it is not necessary to settle the question."

In a similar action in New York, it has been said that the fraud would have authorized the defendant to deliver up the possession and rescind the contract; but that if he affirms the contract and goes into possession, he cannot then either recover back the purchase money paid, or defeat a recovery of the purchase money not paid, as on a total failure of consideration; the most he can claim is to rely on his action for damages for the fraud, or recoup them in an action for the purchase money.†

We ought here to notice an important principle which has been laid down in cases of fraud, well calculated to enforce honesty and fair dealing.

It has been held in Massachusetts, on the sale of a tannery, that where one is deceived in the purchase, by the false affirmations of a third party, and thus pays more than it is worth, the party by whom he was thus deceived cannot defeat the action by showing that the plaintiff sold the property for the same sum which he paid for it; and it was said that the sum for which the party sold the property is not the rule by which to measure the damages, otherwise it might make the question of

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\* See *Smith vs. Griffith*, 8 Hill, 333.

† *Lamerson vs. Marvin*, 8 Barb. S. C. R., 9. In Alabama, as has been said, fraud furnishes no defense at law. *Patton vs. England*, 15 Ala., 69.

fraud depend upon the rise or fall of the property in the market.\*

So, again, where fraud has been practiced in a sale, as of a horse, the measure of damages is, as in an action for the breach of warranty, the difference between the value of the article sold and the value of such an article as it was represented to be, even if, at the time of the sale, the property was fairly worth the price paid.†

As we have already seen, it is competent in all actions of this description, to give in evidence the circumstances which accompany and give character to the acts complained of;‡ but the nature of the testimony that is admissible for such purpose belongs rather to treatises on the subject of evidence. It seems that this rule is confined to such injuries as amount to trespasses, for the obvious reason that to permit a substantive injury requiring a different form of action to be alleged by way of aggravation, would be in effect to confound the forms of action.§ And the plaintiff cannot give evidence of any matters in aggravation not stated on the record, although they would not have supported any independent action, which do not naturally and even necessarily result from the injury alleged on the record. Thus, if the declaration merely alleges a false imprisonment, the plaintiff cannot show in aggravation, that he was stinted in his food, or that he caught an infectious disorder.¶

It is manifest that in the cases which we are now considering, it is difficult, if not impossible, to lay down any general rules. But it seems that the following propositions can be maintained.

The measure of damages does not depend on the form of the action; and though the proceeding be in tort, if no circumstances of aggravation be shown, the relief is restricted to the line of legal compensation.

Even if circumstances of aggravation are made to appear,

\* *Medbury vs. Watson*, 6 Metcalf, 246; approved in *Cornell vs. Jackson*, 3 Cush., 506.

† *Stiles vs. White*, 11 Met., 356.

‡ *Starkie on Evidence*, vol. 2, P. II., 1116; *Trespass*, *supra*, 529, et seq.

§ *Starkie, ubi supra*.

¶ *Starkie, ubi supra*; *Lowden vs. Goodrich*, Peake's C., 46; *Pettit vs. Addington*, *ibid.*, 62.

the court will look into the evidence admitted and the charge delivered; and if it be shown that testimony has been received or instructions given, which, if the purpose of the jury were to give compensatory damages, would have been wrong, the verdict will not be allowed to stand: in other words, the presumption in ordinary cases is, that the jury intended to award compensation only, and not to inflict punishment; and if compensation be the object, it must be regulated by legal principles.

There is a class of cases, however, ranging between those where vindictive damages are claimed, and those in which trespass unattended by any evil motive is complained of. In these cases, where there is clear misconduct on the part of the defendant, yet not so gross as to permit exemplary damages, the courts show a disposition to extend the limit of relief, and carry remuneration beyond what they would do in cases of contract, or of trespass without fault. But this branch of our subject is still far from being reduced to clear and definite boundaries.\*

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\* See *supra*, 79, 80, 81, 83, 113.

## CHAPTER XXIII.

### THE RULE OF DAMAGES UNDER STATUTES.

General principle upon which damages are granted by Statute—Damages for taking private property for public use—in this country—in England—Damages in actions against Towns—for injuries done by animals—Flowing Lands—Patent Cases—Special cases—Damages for detention—Double and treble damages.

MANY interesting questions on the subject of damages arise under particular statutes. There is a large class of cases where a statute, while directing or prohibiting some particular act, omits to annex any penalty, or to prescribe any measure of damages. In these cases the party aggrieved by the forbidden act or omission, has his remedy at law. "The neglect of a compulsory statute which annexes no penalty to the transgression, will found an action at common law to those who have interest, ordaining the defendant either to do what the statute requires, or to pay damages."\* The damages in such case are entirely at large. In reference to acts of this kind, the Court of Exchequer in England recently held this language: "Where a statute prohibits the doing of a particular action affecting the public, no person has a right of action against another merely because he has done the prohibited act. It is incumbent on the part of the complainant to allege and prove that the doing of the act prohibited has caused him some special damage, some peculiar injury beyond that which he may be supposed to have sustained in common with the rest of the Queen's subjects by an infringement of the law. But when the act prohibited is obviously prohibited for the protection of a particular party, then it is not necessary to allege special damage."†

There is another class of cases where the legislature, follow-

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\* *Chamberlaine vs. Chester R. Co.*, 1 Exch. R., 870.

† *Lord Kaimes, Prin. of Eq.*, Book I., Part I., Ch. V., 179.

ing out the idea of the Aquilian law,\* has endeavored to put a stop to all inquiry into the actual damages by fixing an arbitrary sum as the measure of relief. There are others where, in order to punish some particular act, it gives double and treble damages.

Questions of great number and variety arise under the statutes authorizing private property to be taken for public use, whereby a tribunal (generally a jury) is provided to assess the plaintiff's damages. It would be difficult to comment at large on the decisions made under these statutes, always more or less local in their bearing. It may not be improper, however, generally to refer to one or two as specimens of a numerous class. In the case of an arbitration to recover compensation for damage occasioned to the lands, mines, minerals, and works of the plaintiffs, under stat. 29 Geo. III. c. 74, there was no provision in the submission in regard to the measure of damages. The arbitrators made an allowance for the capital and interest invested in working the coal field; and, on motion, the Court of King's Bench held this right.†

In Massachusetts, where a party who has agreed to convey land for a sum certain to a railroad company, refuses to perform, and obtains an assessment of his damages caused by the laying out the road, the measure of the damages to which he is liable for the breach of his agreement, is the excess of the sum assessed over the sum for which he agreed to convey.‡

\* *Supra*, 24.

† In *re Wright et al. vs. Cromford Canal Co.*, 1 Queen's Bench, 98.

‡ *Western R. R. Co. vs. Babcock*, 6 Metcalf, 346.

For other cases in Massachusetts, as to lands flowed by mill-dams, see *Leonard vs. Schenck*, 3 Met., 357. *Snell vs. Bridgewater, C. G. Manf. Co.*, 24 Pick., 296. *Williams vs. Nelson*, 23 Pick., 141. *Hunt vs. Whitney*, 4 Met., 608. *Fitch vs. Stevens*, 2 Met., 505. *Seymour vs. Carter*, 2 Met., 520. *Fitch vs. Seymour*, 9 Met., 462.

In Maine, as to flowing lands, *Nelson vs. Butterfield*, 21 Maine, 220. *Seedensparger vs. Spear*, 17 Maine, 123. Under the poor debtor act, in the same State, *Cordis vs. Sagar*, 14 Maine, 475. *French vs. McAlister*, 20 Maine, 465. *Hathaway vs. Crosby*, 17 Maine, 448.

In Massachusetts, as to sheriffs, &c., *Bartlett vs. Eveleth*, 4 Met., 149. In Mississippi, as to the same subject, *Gwin vs. Breedlove*, 2 Howard, 29.

In England, as to works of public improvement, *Lee vs. Milner*, 2 Mees. & Wels., 825. *Thicknesse vs. Lancaster Coal Company*, 4 Mees. & Wels., 472. *Turner vs. Sheffield & Rotherham Railway Co.*, 10 Mees. & Wels., 425. *Goldie vs. Oswald*, 2 Dow., 535. *Burnet vs. Knowles*, 3 Dow., 280.

In this country, on the same subject, in Massachusetts, *Patterson vs. Boston*, 23 Pick., 425. *Webber vs. Eastern R. R. Co.*, 2 Met., 147. *Dodge vs. County Commis-*

Our constitutions recognize and declare the right of eminent domain on which these statutes are founded; but they intend carefully to protect individual property, and their language generally is, that private property shall ~~not~~ be taken for public use without "*just compensation*;" in construing this phrase, the general principle running throughout the cases seems to be, that a just compensation to the owner for taking his property for public use without his consent, means the actual value of the property in money, without any deduction for estimated profit or advantages accruing to the owner from the public use of his property. Speculative advantages or disadvantages, independent of the intrinsic value of the property from the improvement, are a matter of set-off against each other, and do not affect the dry claim for the intrinsic value of the property taken.\* There are, however, many cases of this description where consequential damages are to be taken into consideration, as, if the injury result from the creation of a new and rival franchise in a case required by public necessity.†

Much discussion has also been made as to whether the compensation in these cases is to be made concurrently with taking the land, or what results are to follow where a concurrent remedy is not provided in the act authorizing the land to be taken.‡

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sioners, 8 Met., 381. *Ashley vs. Eastern R. R. Co.*, 4 Met., 200. *Endicott*, petitioner, 24 Pick., 339.

In New York, in a suit on an attachment bond, given on the commencement of a suit in the Justice's Court, by which the plaintiff is to pay all the damages and costs the defendant may sustain by reason of the issuing of the attachment; if the plaintiff in the attachment fail, the defendant is entitled to recover against the obligors, not only the costs, but also damages for the seizure and detention of the property. *Dunning vs. Humphrey*, 24 Wend., 81. But a subsequent attachment and judgment thereon may be given in evidence in mitigation of damages. *Karl vs. Spooner*, 3 Denio, 246.

As to other cases of damages under statutes in New York, see *Jackson vs. Covert's Admr's*, 5 Wend., 189. *People vs. Supervisors of St. Lawrence*, 5 Cow., 292. *Stewart vs. McGuin*, 1 Cow., 99. *Wendell vs. Washington & Warren Bank*, 5 Cow., 161. *Baldwin vs. Calkins*, 10 Wend., 167.

\* *Jacob vs. City of Louisville*, 9 Dana Rep., 114. *Kent's Commentaries*, Vol. 2, 389, in notes, where many cases are collected.

† *Bonaparte vs. C. and A. R. R. Co.*, 1 Baldwin C. C. U. S., 205. *Gardner vs. Village of Newburgh*, 2 J. Ch. R., 189. *Story, J.*, in *Charles River Bridge vs. Warren Bridge*, 11 Peters, 688. But see *contra*, *Thurston vs. Hancock*, 12 Mass., 220; and *Callender vs. Marsh*, 1 Pick., 418.

‡ In New York, wherever the Governor is authorized by law to take possession of private property, a writ of *ad quod damnum* is provided; and the benefits of this proceeding have in many cases been extended to the United States. 2 R. S., 589.

In regard to the constitutional provision securing trial by jury, it has been decided in New York that a legislative enactment for the ascertainment of railroad damages by a committee is not unconstitutional.\* So in regard to the final decision of the County Court in Vermont.†

In New York it is well settled, that where an act authorizing the taking of private property for public purposes, provides for a just compensation to the owner, it is sufficient that the act makes provision for future compensation. The assessment and payment of damages need not precede the entry and occupation.‡ It has recently been held, too, in relation to railroads running through cities, that the prohibition of the constitution is against *taking* private property, not against *injuries* to property, and that contingent future damages or incidental and consequential injuries of indefinite amount not capable of estimate, do not fall within the statute. So when it is alleged that private property in the neighborhood of a railway will be injured by its vicinity, the claim is inadmissible.§ In Indiana, an act was passed in 1836, providing for a general system of internal improvement. Under this statute it is held that the assessment and payment of damages for injuries done to real estate in constructing a canal must be in gold and silver, and cannot be made in canal scrip.|| In Vermont, on a recognizance given on appeal from a judgment rendered in favor of the

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The original writ of *ad quod damnum* lay where a man would give lands or tenements in mortmain—before the license of the king and chief lords to make such gift was granted, the course was to sue unto the king to have a license to sue this writ out of the chancery, directed unto the escheator, to inquire what damage it would be to the king or to other persons if the king should grant the license.—*Natura Brevium*, in *vac*, 509.

\* *Beekman vs. S. R. R. Co.*, 8 Paige, 45.

† *Gold vs. Vermont Central Railroad*, 19 Verm., 479. In Tennessee, the proceeding by writ of *ad quod damnum*, to assess damages where the land of the applicant is subject to a public easement, has been decided to be not in derogation of the common law, but in accordance with its provisions. *Nolensville Turnpike Co. vs. Quimby*, 8 Humphreys, 476.

‡ *Smith vs. Helmer*, 7 Barb. S. C. R., 416.

§ *Drake vs. Hudson R. R. Co.*, 7 Barb., 508.

|| *The State vs. Blackmo*, 8 Blackf., 246. See, also, *The State vs. Digby*, 5 Blackf., 384, and *Lucas vs. Hawkins*, 8 Blackf., 337. As to assessment of damages on a writ of *ad quod damnum* in the same State, see *Chapman vs. Groves*, 8 Blackf., 308, and *Peck vs. Van Rennselaer*, 8 Blackf., 312. An interesting discussion as to the principle of railroad damages will be found in *Somerville & Easton Railroad Co. ads. Dougherty*, 2 Zabriskie, 495.



landowner, the plaintiff is not entitled to recover the value of the rents and profits, but only his costs.\* In Massachusetts, an action against a town to recover damages assessed by county commissioners in laying out a town way over the plaintiff's land, cannot be commenced before the land is entered on and possession thereof taken.†

An English Statute‡ declares that a railway company shall make full compensation for all damage sustained by any parties by reason of the exercise of the powers of the company; and it also prescribes the mode of ascertaining the amount of compensation where any party shall have been injuriously affected by the work, and for which they shall not have received satisfaction. Under this act it has been held that where the proximity of a railway crossing a private road diminished the value of the property, (and Lord Campbell, C. J., intimated that the mere passage of the trains close to the house would have the same legal effect), it was held to give a right to redress, and the court said, "the company have done and do that which would be an actionable injury unless done under the powers conferred by the act, and that is a very fair criterion to see if lands are injuriously affected within the statute.§

In England, by the Land Clauses Consolidation Act, 8 Vict., c. 18, compensation is given for any lands, or "any interest therein, which shall have been taken for, or injuriously affected by the execution of the work." And under this statute damage done by dirt and dust and the obstruction of customers, is a subject of remuneration.|| Under this statute, also, the damages must be paid before entry.¶

Where a dock company authorized to take lands were to make "compensation for the damage occasioned to any such land by the execution of the works," it was held that this language would include compensation to a land owner parting with his premises, for loss which he would sustain by having

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\* *Drew vs. Chamberlain*, 19 Verm., 578.

† *Harding vs. Inhabitants of Medway*, 10 Met., 465. *La Croix vs. the same*, 12 Met., 128.

‡ 8 & 9 Vict., c. 20, § 6.

§ *Glover vs. N. Staffordshire Railway Co.*, 15 Jur., 678.

|| *East and W. I. Docks vs. Gattke*, 15 Jur., 261.

¶ *Ramsden vs. Manchester R. Co.*, 1 Exch., 728.

to give up his business as a brewer until he could obtain other suitable premises for carrying it on.\*

An interesting though not very numerous class of cases, relate to the statutes which impose penalties on witnesses for non-attendance in obedience to a subpoena. The original English statute† imposed a penalty of ten pounds on any witness who made default and refused to appear, "having not a lawful or reasonable let or impediment to the contrary, the said penalty to be recovered by the party so grieved." Under this statute and those in analogy to it enacted in this country, it has been held that to entitle the plaintiff to recover it must appear that the witness was material, and that damages resulted from his non-attendance; evidence, therefore, that the plaintiff had admitted that the defendant knew nothing about the matter in controversy, is admissible.‡ A similar liability exists at common law, independent of the statute, and may be enforced by an action on the case.§

In many of the States, and particularly in New England, laws have been passed to compel the towns to keep their highways and bridges in repair, and requiring them to make compensation for any injury resulting from their neglect. In Connecticut, it has been decided on a statute of this kind, that towns liable to pay *just* damages for defects in bridges or roads, are not liable for *consequential* damages, such as the loss of service, and expense of nursing, resulting to a person from injuries to his wife and daughter.]

The Maine statute provides that "any person who shall suffer any damage in his property," through any defect in a highway, may recover of the town liable to keep the highway in repair, the amount of such damage. In a case on this statute, it was held that a plaintiff traveling with a hired horse, which had been ruined by a defect in the road, and the value of which he had paid to the owner, could recover the sum so paid of the town.¶

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\* Jubb *vs.* Hull Dock Co., 9 Q. B., 448.

† 5 Eliz., c. 9, § 12.

‡ Goodwin *vs.* West, Cro. Car., 522, 540. Courtney *vs.* Baker, 3 Denio, 27.

§ Pearson *vs.* Lea, Doug., 561. Haabrouck *vs.* Baker, 10 J. R., 248. See Hurd *vs.* Swan, 4 Denio, 75.

] Chidsey *vs.* Canton, 17 Conn., 475.

¶ Littlefield *vs.* Biddeford, 29 Maine R., 310.

Injuries done by animals form another class. At common law, the owner of a dog is accountable for mischief done by him if he had notice of the animal's vicious propensities. This liability is enlarged by statute in New York, where the owner of the dog is made liable for injuries done to sheep, although he has no previous notice. In an action on the statute, the proprietor is not liable, however, to exemplary damages; and where dogs of several owners join in the trespass, each owner is severally liable only for the damage done by his own dog.\*

In Massachusetts, it is enacted "that any owner or keeper of any dog shall forfeit to any person injured by such dog, double the amount of *the damage sustained by him*;" and it has been held in construing this language, that when the action is brought by the plaintiff for injury done to his minor son, he might recover for the loss of the child's service, and the expense of his cure.†

The rule that penal statutes are to be strictly construed, is applied to enactments on the subject of damages. So in Mississippi, where a statute gave a penalty of "damages in lieu of interest not exceeding thirty per cent. per annum against attorneys for refusing to pay over moneys when collected for their clients," it was held a penal statute to be strictly construed, and that none but "*clients*," strictly, could avail themselves of it.‡

We have seen under the head of debt, that damages are awarded, not for the debt, which is recoverable in *numero*, but for its detention. This principle is applied to penalties given by statutes, which must, unless some other form of action is provided, be recovered in an action of debt.§ But a nice question has presented itself on the construction of statutes of this description, whether in the particular case the penalty is to be regarded as a debt or as unliquidated damages. There is a clear distinction between actions brought simply for penalties,

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\* *Auchmuty vs. Harn*, 1 Denio, 495. *Van Stearbergh vs. Tobias*, 17 Wend., 562. *Russell vs. Tomlinson*, 2 Conn., 206. *Adams vs. Hall*, 2 Verm., 9.

† *McCarthy vs. Guild*, 12 Met., 291.

‡ *Sloan vs. Johnson*, 14 Smede. & Mar., 47.

§ Where a statute creates a liability to pay money, but does not prescribe any remedy by which a recovery shall be had, debt is the proper remedy. *Strange vs. Powell*, 15 Ala., 452.

and actions brought under penal statutes to recover compensation for injuries.\*

If a sum certain be given, by way of penalty, to the party aggrieved, he may recover not only the money, but damages for its detention.† But if the penalty be given to the party suing, a common informer is not allowed damages for the detention.‡ But if double or treble damages be given by way of penalty, not even the party aggrieved can have damages for the detention; because the sum being uncertain, it is not to be considered as a debt.§

Where double or treble damages are given, it has been held doubtful how the double or treble value is to be arrived at; whether the jury are to find single damages to be increased by the court, or whether they are to find double the whole amount awarded by the statute.¶ The general and better practice would seem to be, for the jury to find single damages, and for the court to double or treble them; although it would probably be equally good for the jury to assess the augmented damages, if it appear on the record that such assessment was in fact made. But in debt for a penalty of double the value of a vessel and cargo under the embargo act of 9th January, 1808, it was held by Mr. Justice Story that the verdict of the jury must be taken to be the double value, unless the contrary appears.¶

We have already, under the head of interest, examined some of those statutes which give damages or interest by way of

\* *Fife vs. Bousfield*, 6 Q. B. R., 100; and *Fitzhall vs. Brooke*, 6 Q. B. R., 878.

† *North vs. Wingate*, Cro. Car., 559. *Supra*, 392.

‡ *North vs. Musgrave*, 1 Rol. Abr., 574; *Damages*, P.

§ *Dagge vs. Kent*, Cro. J., 70. Mr. Sayer states this proposition positively; but it seems by the report that the plaintiff released his damages "because he was in doubt."

¶ The authorities are Bro. Abr. *Damage*, pl. 70. 5 Com. Dig. *Plead.*, 2. § 16. 2 Roll., 54. *Sayer on Damages*, 242. *Bennett vs. Hart*, *Sayer on Damages*, 244. *Grant vs. Astle*, Doug., 723, n. 781. *Lobdell vs. Inhabitants of New Bedford*, 1 Mass. R., 152.

¶ *Cross vs. The United States*, 1 Gallison, 96. In Maine it has been said, that where a statute gives double damages it is wholly immaterial whether they be assessed by the court or the jury. *Quinby vs. Carter*, 20 Maine, 218. See, also, *Warren vs. Doolittle*, 5 Cow., 678.

As to double and treble damages in New York, see *Hubbell vs. Rochester*, 8 Cow., 115. *Brown vs. Bristol*, 1 Cow., 176. *Livingston vs. Platner*, 1 Cow., 175. *Benton vs. Dale*, 1 Cow., 160. *Morris vs. Brush*, 14 J. R., 328. *Beekman vs. Chalmers*, 1 Cow., 584.

damages on unsustainable writs of error. Sometimes a penalty is imposed, as in Ohio, of simple cost.\*

The subject of damages arising from the overflow of lands, resulting from the erection of dams, has been in many States of the Union brought very much under the control of special statutes. At common law the riparian land owner has a right to have the natural water-course kept open the whole time. But in order to give security and quiet to mill owners in several States of the Union, statutes have been passed, as in Massachusetts, to regulate the erection and maintenance of those dams, which if observed by the proprietor will secure him from any action at common law.† But if the provisions of these statutes are not complied with, as where the dam is kept up at a season of the year prohibited, the mill owner shall have no benefit of the statute, but be liable as if it had not been passed to a suit at common law for the disturbance.‡

In the same State it has been held that the provisions of these statutes for the support and regulation of mills, cannot be so construed as to justify or excuse the erection of a dam in such a manner as to overflow a public highway and render it impassable;§ and in an action by the town against a mill owner in such a case, the plaintiffs are entitled to recover the expense incurred in repairing the road, with interest, but not the costs of an indictment for not seasonably repairing the road.||

In New York, by the general railroad act of 27th March, 1848, when the company neglects to erect fences at the sides of the road, and to construct and maintain cattle guards at road crossings, the company is liable for the death of a cow which comes on the track and is killed, without any proof of negligence on the part of the agents of the company.¶

In Massachusetts, where the lessee, on appealing from a judgment in favor of the lessor, gives the statutory bond to pay the intervening rent and damages, such damages are only the rent and interest, and cannot be construed to embrace loss of

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\* *Brady vs. Christopher*, 19 Ohio, 26.

† *Stowell vs. Flagg*, 11 Mass., 364.

‡ *Johnson vs. Kuttridge*, 17 Mass., 76. *Hill and wife vs. Sayles*, 12 Met., 142.

§ *Commonwealth vs. Stevens*, 10 Pick., 247.

|| *Inhabitants of Andover vs. Sutton*, 12 Met., 182.

¶ *Suydam vs. Moore*, 8 Barb. S. C. R., 358. *Waldron vs. Rensselaer & S. R. Co.*, 8 Barb. S. C. R., 390.

the sale of the premises or injury to them ; nor can proof be received that the occupation was worth more than the stipulated rent.\*

Under the New York city mechanics' act, as it is called, intended to protect material men and laborers, for work done and materials furnished for buildings, the claimant cannot obtain a lien on unliquidated damages, which the builder has sustained by being wrongfully discharged, and thus prevented from completing his contract, but is restricted to such funds as are due and to become due for actual performance.†

Under this head, too, should be considered the subject of actions for infringement of patents. The patent act of the United States authorizes the jury in cases of infringement, to give a verdict for the actual damages sustained ; and we have already had occasion to consider the question, whether counsel fees can be allowed by way of damages in actions of this class.‡ As to the damages themselves, it has been held that full damages are usually given for the patented articles which have been made and sold to be used, and not for the selling or buying or making alone.§ If the maker of the machine appear in truth to be ignorant of the existence of the patent, and do not intend any infringement, though this will not altogether exonerate him, it will tend to mitigate the damages.||

Where a claim for damages exists against agents or officers of the United States government, and the Congress of the United States has acted on the claim, and passed a statute awarding damages for the injury done, that is a final disposition of the matter, and no further redress can be obtained from the courts of law.¶

\* *Bartholomew vs. Chapin*, 10 Met., 1.

† *Hoyt vs. Miner*, 7 Hill, 525.

‡ *Supra*, 99.

§ 10 Wheat., 850. 8 McLean, 427.

|| *Bryce vs. Dorr*, 8 McLean, 583. *Whittemore vs. Cutter*, 1 Gallison, 429. *Jones vs. Pearce*, Webster's P. C., 125. *Hogg vs. Emerson*, 11 Howard, 587-607. See, also, *Lowell vs. Lewis*, 1 Mason C. C., 182.

¶ *U. States vs. Williams*, 4 McLean, 567.

See *Regina vs. The Mayor, &c., of Lichfield*, 15 Jur., 812 ; a case upon the English Municipal Corporation Act, 5 & 6 Will. 4, c. 76, where the power of the Lords of Treasury to make compensation to a party removed from office was considered.

## CHAPTER XXIV.

### OF DAMAGES WITH REFERENCE TO PLEADING AND PRACTICE.

Damages, General and Special—Special Damages to be averred in the Declaration—Misjoinder of Counts and Assessment of entire Damages—Jurisdiction of the Courts of the United States with reference to Damages—Damages with regard to Costs.

THE most important remark to be made on this part of our subject, is as to the necessity of distinctly averring in the declaration the damage of which the plaintiff complains. Great nicety has been used in regard to the peculiar mode of allegation; thus, it has been doubted whether an averment was sufficiently clear and positive if preceded by the word “whereby,” or “thereupon,” on the ground that the words following the “whereby” or “thereupon” could not be considered as containing an averment of *matter of fact*, but merely matter of conclusion or inference drawn from the matters previously alleged. But it now seems to be well settled, that where the allegation following such a word as “thereupon” or “whereby” is clearly intended as an *allegation* of fact, the matter is to be considered averred with sufficient directness, the word “thereupon” or “whereby” not being understood as showing that the proposition following such word, is intended to be stated as a consequence deducible from what precedes, but only as showing the time at which, or the occasion on which that which follows the word in question is averred to have taken place.\* But if the averment is merely one of a legal liability, it is well established that such an averment being one of matter of law, will not supply the want of those allegations of fact from which alone the court could infer the law to be as stated; so that such

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\* Puyce vs. Belcher, 8 M. Gr. & S., 58. Brown vs. Mallett, 5 M. Gr. & S., 598.

allegation is useless when the declaration is insufficient, and superfluous when sufficient without it.

A question of more frequent occurrence is, as to the necessity of averring the particular cause and extent of any special damage for which the plaintiff claims redress.

"Damages," says Mr. Chitty,\* "are either general or special. General damages are such as the law implies or presumes to have accrued from the wrong complained of. Special damages are such as really took place, and are not implied by law; and are either superadded to general damages arising from an act injurious in itself, as where some particular loss arises from the uttering of slanderous words actionable in themselves, or are such as arise from an act indifferent and not actionable in itself, but injurious only in its consequences, as where words become actionable only by reason of special damage ensuing. It does not appear necessary to state the former description of damages in the declaration; because presumptions of law are not in general to be pleaded or averred as facts. But when the law does not *necessarily imply* that the plaintiff sustained damage by the act complained of, it is essential to the validity of the declaration that the resulting damage should be shown with particularity; and when the damages sustained have not necessarily accrued from the act complained of, and consequently are not implied by law, then, in order to prevent the surprise on the defendant, which might otherwise ensue on the trial, the plaintiff must in general state the particular damage which he has sustained, or he will not be permitted to give evidence of it."†

So in the Queen's Bench, in an action on the case for an excessive distress, it was held that no mention being made, in the declaration, of the *sale*, either for damage or by way of substantive complaint, the plaintiff could only recover damages in respect to the detention of the property, and not for the sale.‡

So in New York, in an action on the case, in which the plaintiff declared against the defendant for placing a quantity of lime,

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\* Chitty on Pleading, vol. i., 423, cited in *Dumont vs. Smith*, 4 Denio, 319. Vide *supra*, 67 and 178.

† "The damages sustained are matter of evidence, and need not be alleged; nor are they scarcely ever stated but in a general manner." *Barruso vs. Madan*, 2 J. R., 149.

‡ See, also, Chitty on Pleading, vol. i., 370, et seq., same subject. See, also, *De-forest vs. Leste*, 16 J. R., 122; where held, that in an action on the covenant against incumbrances, it was not enough to aver that the premises were incumbered, but that the declaration must set out the extinguishment of the incumbrance. See also, *Butler vs. Kent*, 19 J. R., 228; and *Arrowsmith vs. Gordon*, 3 L. Ann. R., 115.

† *Thompson vs. Wood*, 4 Q. B., 498. In *Driggs vs. Dwight*, 17 Wend., 71, in New York; and in *Ward vs. Smith*, 11 Price, 19, in England,—special damage was allowed, though not stated in the declaration. In *Leland vs. Tousey*, 6 Hill, 328 (New York), it was intimated that an averment of consequential damage, though too remote and ineffectual, is no ground of demurrer.



sand, and other building material, opposite to his store, so that the free passage to it was interrupted, and the dust and dirt of the materials blew into his store and damaged his goods, it was held, that proof that customers were prevented from frequenting the store, and that a tenant who occupied it, left it in consequence of the nuisance, whereby it remained empty, was inadmissible, because not alleged in the declaration as special damage. "When the damages," said the Supreme Court, "actually sustained do not necessarily arise from the act complained of, and consequently are not implied by law, in order to prevent surprise to the defendant the plaintiff must state in his declaration the particular damage which he has sustained, or he will not be permitted to give evidence of it upon the trial. Here there is no claim for damages, in the declaration, for the loss of customers. \* \* The loss of the tenant and the consequent loss of the rent, ought to have been specially alleged in order to entitle the plaintiff to have proved them as damages."\*

So in a still more recent case in the same State, in an action of trespass on the case, the declaration alleged that the defendant in consideration of the sale by the plaintiff to him of certain premises in the city of New York, covenanted that he would erect on them a brick dwelling-house, and would not erect on them any building to be occupied in any manner that would be a nuisance to the vicinity of the premises. The declaration then proceeded to aver, that the defendant had not erected a brick dwelling-house, but had permitted a bake-house to be erected on the premises, and suffered it to be occupied in a manner that was a nuisance to the vicinity of the premises. There was no allegation of special damage, but the declaration concluded generally to the damage of the plaintiff, \$6,000. On the trial, the plaintiff's counsel offered to prove actual damage sustained by him in the depreciation of the value of premises owned by him, adjacent to the lot in question, occasioned by the erection of the bake-house. But the evidence was excluded on the ground of the want of any allegation of special damage in the declaration; and the judge who tried the cause, held that the plaintiff could only recover nominal damages. By consent, a nonsuit was ordered, and on motion to set this aside, the

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\* *Squier vs. Gould*, 14 Wend., 159.

Supreme Court held the decision right. "Suppose," said Cady J., "the bake-house has been so occupied as that it has been a nuisance, how has it damnified the plaintiff? The declaration does not show that he has been annoyed by the heat and smoke issuing from the bake-house, or that he has any property which has been lessened in value by it."\*

So in Alabama, it has been held that in an action brought by a firm for a malicious prosecution, proof of special damage arising from loss of reputation, credit, or business, can not be given unless it is specially averred in the declaration.† And the principle has been recognized in South Carolina.‡

The allegation is only required to be of the fact as it exists in legal contemplation. So, an allegation that the plaintiff has been put to great expense, will be satisfied by proof that he has incurred a liability to pay.§

An important question in regard to the subject of damages, as connected with pleading, is that in relation to the misjoinder of counts, and the assessment of damages thereon; but as this matter belongs also to the head of practice, it will be considered under that branch of our subject. We have already had occasion, when treating of the rights of parties with reference to the state of things at the commencement of the suit, to speak of the necessity of pleading specially matters arising after suit brought.||

In regard to the amount of damages to be averred, it is only necessary to lay them so high as to cover the injury; for no recovery can be had beyond the amount in the declaration. It was indeed anciently held, both in actions of *indebitatus assumpsit* and *insimul computassent*, that the plaintiff could not recover any less amount of damages than the precise sum laid in the declaration.¶ But it is now well settled otherwise, and thus, even in an action on a policy of insurance averring a total loss, a recovery may be had for a partial loss.\*\*

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\* *Bogart vs. Burkhalter*, 2 Barb. S. C. E., 525; and as to allegation of special damage in trover, vide ante, 497 and 498.

† *Donnell vs. Jones*, 18 Ala. N. S., 490.

‡ *Rowand vs. Bellinger*, 8 Strobb., 373.

§ *Richardson vs. Chasen*, 10 Q. B. R., 756.

|| *Supra*, 110.

¶ *Sayer on Damages*, Ch. X., 43, et seq. *Bagnall vs. Sacheverel*, Cro. Eliz., 292. *Ramsden's Case*, Clayton, 87.

\*\* *Chitty on Pleadings*, vol. 1, 371. *Marshall on Insurance*, 629.

But the rule the other way is adhered to with severity. If the jury assess the damages at a sum beyond the amount laid in the declaration, the plaintiff must remit the excess and take judgment only for the residue. If judgment be entered for the whole amount of damages found by the jury, it is error.\* In many cases of joint trespass and several damages given, the plaintiff is permitted to enter one joint judgment against all, assuming the largest sum assessed against any one as the damages against all, *de melioribus damnis*.† Where the plaintiff's particular of demand stated the action to be brought for one year's salary, or damages for the dismissal of the plaintiff before the expiration of the year, it was held sufficient to let in a claim on a *quantum meruit* for work done during a portion of the year, it not appearing that the defendant was misled.‡

There has been much discussion how far a plea can be put in to the damage only; and the reasonable rule appears to be that such a plea is bad, unless the damage is so essentially the cause of action that without it the suit could not be maintained.§ As to demurrer, it is no ground of demurrer to an entire breach in an action of covenant that certain consequential damages alleged are not recoverable. If the plaintiff is entitled to recover for any damage it is sufficient to support the breach.||

An important question as to damages with reference to pleading, is presented in the United States, in regard to the jurisdiction of those courts which are prohibited from taking cognizance of any cases unless a certain pecuniary amount is in controversy: as in regard to the Circuit Courts, which do not usually exercise their jurisdiction over cases involving less than five hundred dollars; and the Supreme Court of the United

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\* *Hobkins vs. Kimble*, 1 Bulst., 49. *Cheveley vs. Morris*, 2 W. Black., 1800. *Curtiss vs. Lawrence*, 17 Johns., 111. *Dox vs. Day*, 8 Wend., 856. *Fiah vs. Dodge*, 4 Denio, 811. *Fowlkes vs. Webber*, 8 Humphreys, 580. *David vs. Conard*, 1 Iowa, 386. In this last named State (Iowa), the omission to aver damages at the conclusion of a declaration, and of each count, is cured by the verdict, when the declaration contains an allegation of indebtedness for a greater amount than that of the judgment. In Mississippi, it is no objection to a verdict that it is for more than the amount indorsed on the writ, if it correspond with the amount laid in the declaration. *Williams vs. Williams*, 11 Smede. & M., 398.

† *Halsey vs. Woodruff*, 9 Pick., 555. *Fuller vs. Chamberlain*, 11 Met., 508.

‡ *Harris vs. Montgomery*, 15 Jur., 757.

§ *Robinson vs. Marchant*, 7 Q. B., 918. *Wilby vs. Elston*, 8 Man. Gr. & S., 142.

|| *Amory vs. Brodrick*, 5 B. & Ald., 712.

States, the appellate jurisdiction of which in like manner commences at the sum of two thousand dollars. And it has been frequently decided "that the damages claimed in the writ and declaration are the sum in controversy." Even if the plaintiff recover less than \$500 it cannot affect the jurisdiction of the court, if a greater sum be claimed in his writ.\* But on application to remove a suit from the State Court, it has been intimated that the amount in the declaration is not conclusive, and that the plaintiff's affidavit may be received to controvert it.†

On a writ of error, though the verdict in the Circuit Court be for less than \$2,000, but more than that sum is claimed in the declaration, if the plaintiff bring error, the Supreme Court has jurisdiction; for the judgment may be reversed, and the whole amount claimed recovered.‡ But this is not so if the writ of error is brought by the defendant.§ In such case the amount in controversy is to be decided by the sum in controversy at the time of the judgment, and not by any subsequent additions thereto, such as interest. The Court cannot look beyond the time of the judgment in order to ascertain whether a writ of error lies or not.¶

And where the demand is not for money, and the nature of the action does not require the value of the thing demanded to be stated in the declaration, the recognized practice of the courts of the United States has been to allow the value to be given in evidence.¶

Whenever it becomes important to set up the defense of the statute of limitations to claims for damages, as in cases of nuisances of long standing, it is necessary that it should be pleaded, otherwise it will be disregarded.\*\* It belongs to this

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\* *Gordon vs. Longest*, 16 Peters, 97 and 104.

† *People vs. Judges of N. Y. C. P.*, 2 Denio, 197.

‡ *Gordon vs. Ogden*, 3 Peters, 38.

§ *Smith vs. Honey*, 3 Peters, 469. See, also, *Wilson vs. Daniel*, 3 Dall., 401. *United States vs. McDowell*, 4 Cranch, 316. *Course vs. Stead's Ex'r*, 4 Dall., 22. *Brown vs. Barry*, 3 Dall., 365. *United States vs. Brig Union*, 4 Cranch, 216. *Peyton vs. Robertson*, 9 Wheat., 527. *Ritchie vs. Mauro*, 3 Peters, 243. *Cooke vs. Woodrow*, 5 Cranch, 13. *Scott vs. Lunt's Adm'r*, 6 Peters, 349. *United States vs. McDaniel*, 7 Peters, 1.

¶ *Knapp vs. Banks*, 3 Howard, 73. See, also, *Wilson vs. Sandford*, 10 Howard, 99.

¶ *Ex parte Bradstreet*, 7 Peters, 634. *United States vs. Brig Union*, 4 Cranch, 216. *Course vs. Stead's Ex'r*, 4 Dall., 22.

\*\* *Waggoner vs. Jermaine*, 3 Denio, 306; 2 Saunders, 66, note 3; 1 Chitty Pl., Ed. 1887, 517, note.

branch of our subject to mention that accord and satisfaction by parol, or by writing not under seal, cannot be interposed as a bar to a debt by record, or by specialty, where the debt arises on the deed; but it may be set up as a bar to damages founded on the breach of a specialty.\*

Of the rules of pleading bearing on the defense, the most important is that which relates to tender. A tender may be made and pleaded where the demand is in the nature of a debt, when the sum due is either certain or capable of being made certain by mere computation; but it is not allowed when the action is for unliquidated damages, the amount of which is to be determined by the exercise of discretion by a jury.†

If the rules of pleading are correctly followed, the only remaining questions in regard to damages are those which come properly under the head of practice. The most important of these is that which presents itself at the trial of the cause in regard to the right to begin, as it is called; or, in other words, in what cases does the necessity of proving damages give the plaintiff a right to open and close the cause, where the affirmative of the issue is with the defendant? The importance of this subject has been recently clearly stated by a judge of great experience. "It, unhappily, still remains of great importance to the administration of justice by a jury that the right to begin should be correctly adjudicated on; for all who are conversant with those trials at *nisi prius*, in which the address of counsel may materially affect the result, well know that the issue often ultimately depends on the decision which party has a right to begin."‡

In England, it has at length been settled by a rule of all the judges, that the plaintiff shall begin in all actions for personal injuries, libel, and slander, though the general issue may not be pleaded and the affirmative be on the defendant. In actions of contract,§ however, the subject is still involved in

\* *Blake's Case*, 6 Rep., 43. *Bac. Ab.*, Accord and Satisfaction. *Alden vs. Blague*, Cro. Jac., 99. *Kaye vs. Waghorne*, 1 Taunt., 428. *Strang vs. Holmes*, 7 Cowen, 224. *Mitchell vs. Hawley*, 4 Denio, 414.

† *Chitty on Contracts*, 798. *Green vs. Shurtliff*, 19 Verm., 592. *Holmes vs. Woodruff*, 20 Verm., 97.

‡ *Pollock C. B.*, in *Ashby vs. Bates*, 15 M. & Wels., 559; where a new trial was ordered because of an erroneous ruling at *nisi prius* as to the right to begin. See, also, *Booth vs. Milnes*, 15 M. & Wels., 649.

§ *Greenleaf on Evidence*, § 76, 8d ed., 149. *Mercer vs. Whall*, 9 Jur., 576. and 5 Q. B., 447.

uncertainty. An effort has been made to make the right depend on whether the plaintiff goes for substantial relief or for nominal damages; but the point does not appear to have been yet authoritatively settled.\*

In this country, says Mr. Greenleaf, in his very valuable work on Evidence, "it is generally deemed a matter of discretion, to be ordered by the judge at the trial as he may think most conducive to the administration of justice; but the weight of authority as well as the analogies of the law, seem to be in favor of giving the opening and closing of the cause to the plaintiff, whenever the damages are in dispute, unliquidated, and to be settled by the jury upon such evidence as may be adduced, and not by computation alone."†

It appears to me that this language ascribes a greater discretion to the judge trying the cause, and would lead to greater laxities, than are in fact allowed. In Massachusetts, it has been said, citing with approbation the language of Lord Denman,‡ "Wherever, from the state of the record at nisi prius, there is any thing to be proved by the plaintiff, whether as to the facts necessary for his obtaining a verdict, or as to the amount of damages, the plaintiff is *entitled* to begin. But when the *onus probandi* lies on the defendant, he is entitled to begin." So in the same State, when in trespass the defendant pleads soil and freehold in himself without any other plea, and issue is joined thereon, the right of opening and closing the argument before the jury belongs to the defendant.§ So, in the same State, on the hearing before a jury to re-assess damages for taking land for a railroad, the party claiming damages has the right to open and close, and a contrary ruling at the trial was held erroneous.||

We have already said that an important question may arise as to the assessment of entire or several damages.¶ The

\* Chapman *vs.* Rawson, 8 Q. B., 678. Cannam *vs.* Farmer, 2 Car. & Kir., 747. In the Exchequer, the crown has the right to a general reply in all cases where the crown has an interest. Chandos *vs.* Comm'r of Inland Revenue, 20 Law J. Rep. N. S., Exch., 269.

† Greenleaf on Evidence, § 76, 150, 8d ed., where cases will be found.

‡ In Mercer *vs.* Whall, 5 Adol. & Ellis, 447.

§ Davis *vs.* Mason, 4 Pick., 156.

|| Conn. River R. R. *vs.* Clapp, 1 Cushing R., 559.

¶ Supra, 576.

jury may assess entire, or distinct damages on each of the counts, when separate injuries have been proved. If distinct damages be assessed, judgment may be given on either of the counts; but if the jury find entire damages on all the counts, the judgment must be entire; and in this case, if one of the counts be insufficient, judgment will be arrested, or a writ of error be sustainable.\* This may be where a good count is joined with a bad count; or where a bad assignment of breaches is joined with good; or where counts, though good in themselves, are improperly joined; or where a single count contains good and bad causes of action; and in those cases, if general damages are assessed, the practice has been different. If the verdict can be amended or applied to the good counts, this in some cases will be done.† And it has been said in England to be a settled rule that, "if the same count contains demands for one of which the action lies and not for the other, all the damages shall be referred to the good cause of action, though it would be otherwise if they were in separate counts."‡

But if the verdict can not be awarded or applied to the good counts, then the question is whether the cause should be tried again, or the judgment entirely arrested. In some cases the judgment has been arrested;§ and this still seems the practice in England, where counts good in themselves are improperly

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\* Chitty on Pleadings, vol. i., 447. *Hambleton vs. Veere*, 2 Saunders, 196. *Ed-dowes vs. Hopkins*, Doug., 876. *Grant vs. Astle*, Doug., 752. In this case Lord Mansfield, while he maintained the doctrine, declared the rule "inconvenient, ill-founded, and absurd," and called attention to the fact, that it did not apply to criminal prosecutions. But in *O'Connell vs. Reginam*, 9 Jurist, 25, the same principle was applied to an indictment for conspiracy. See, also, *Cheetham vs. Tillotson*, 5 J. R., 490. The rule in civil actions has been recently affirmed in England. *Eliot vs. Allen*, 1 Man. Gr. & Scott, 18. Where a breach gives no data to regulate the assessment of damages, though it negative the words of the condition of the bond, it is not well assigned. *People vs. Russell*, 4 Wend., 570. But if so assigned that the plaintiff would be entitled to nominal damages only, it is not enough. *Albany Dutch Church vs. Vedder*, 14 Wend., 165. *Backus vs. Richardson*, 5 J. R., 476.

† Chitty on Pleadings, vol. i., 448.

‡ *Doe & Lawrie vs. Dyeball*, 8 B. & C., 70. *Kitchenman vs. Sheel*, 3 Erchequer, 49.

§ Com. Dig., Damages E., 5. *Corner vs. Shew*, 4 Mees. & W., 168. Where the plaintiff declares upon a contract consisting of several parts, and assigns, among other breaches, one which, from his own showing, could not have taken place before the action was brought, the court cannot intend that the damages, if assessed generally, were given only for that matter in the count which was actionable, and therefore will reverse the judgment. *Gordon vs. Kennedy*, 2 Binn., 287. *Lewis vs. Whitham*, 2 Strange, 1185.

joined, which is in truth a misjoinder of causes of action;\* but where good counts are joined with bad, the rule now seems to be that a new trial will be awarded.†

Such seems the well settled system in England, but in some parts of our Union a more rational rule has been adopted. In Connecticut, the Supreme Court has recently said, "that if there be good and bad counts, or good and bad matter in the same count, the presumption in our courts is, that damages are given on the good parts."‡

So in Ohio, if the declaration contains a good count among defective counts, the court on error will intend that the verdict was well taken on the good count, unless the record shows that it was rendered upon those that were defective.§

Mr. Sergeant Williams, in his valuable notes to Saunder's Reports,|| after collecting a great number of cases on this subject, observes that the result of them all appears to be, that where it is expressly and positively averred in the declaration that the plaintiff has sustained damages for a cause arising subsequent to the commencement of his suit, or previous to his having any right of action, and the jury gives entire damages, the judgment will be arrested. But when the cause of action is properly laid, and the other matter comes in either under a *scilicet*, or is void, insensible, or impossible, and it, therefore, cannot be intended, that the jury ever had it under their consideration, the plaintiff will be entitled to judgment.¶

The better mode, of course, where any difficulty of this kind is apprehended, is to assess the damages severally on each count. In such case the judgment will be arrested only on the count that is bad.\*\*

So part of a count may be bad; and in such a case, where,††

\* Johnson *vs.* Mullin, 12 Ohio, 10. Chisom *vs.* School Directors, 19 Ohio, 289.

† Kitchenman *vs.* Sheel, 8 Exch., 49.

‡ Leach *vs.* Thomas, 2 Mees. & W., 427. Emblin *vs.* Dartnell, 12 M. & W., 880. Graves *vs.* Waller, 19 Conn. R., 90.

§ Hopkins *vs.* Beadle, 1 Caines, 847. Lyle *vs.* Clason, 1 Caines, 581.

|| 2 Saund., 169.

¶ Steele *vs.* Western Inland L. N. Co., 2 J. R., 286.

\*\* Hayter *vs.* Moat, 2 M. & W., 56. In the case of Gregory *vs.* The Duke of Brunswick, 7 Scott's New Rep., 972, the jury having found a general verdict for the defendants, the court refused to award a *venire de novo* on the ground that they had not assessed damages on the issue at law.

†† Campbell *vs.* Lewis, 8 Barn. & Ald., 392.



in an action of covenant for quiet enjoyment, the plaintiff had averred by way of special damages, after setting out an eviction, that he had lost divers large sums of money expended on and about improving the premises, it was insisted that, as part of the special damage did not fall within the covenant, and the jury had assessed general damages, the whole was erroneous. But Abbott, C. J., intimated that, the whole declaration consisting of one count, *after verdict* it was to be presumed that the judge at the trial directed the jury to confine their attention to that part of the special damage only which was relevant to the covenant broken. So in New York, it has been held that where a count contains two separate and distinct allegations of damages, one actionable and the other not, no motion in arrest of judgment will be sustained; for the court will intend, after verdict, that the damages were only given for the actionable part of the declaration.\*

In regard to the verdict, the question of severance is important in another point of view. Where several persons are jointly charged in an action of tort, as of assault, battery, and false imprisonment, and they either plead jointly, or severally in their pleas, or one suffer judgment to go by default, if the jury assesses several damages, the verdict is wrong, and the judgment will be erroneous;† for the trespass being jointly charged, and the jury finding them jointly guilty, the damages cannot be separated, and consequently the verdict should be for the amount which the most culpable ought to pay. But in such a case, the difficulty can be remedied by entering a *nolle prosequi* against all but one, and taking judgment against him only.‡

But, on the other hand, if the charge is several, the rule is the reverse. So, in an action against divers persons found guilty of several takings or offenses, damages ought to be assessed against them severally; as in trespass for battery and goods, if one be found guilty for the battery, and the other for the goods taken.

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\* Steel *vs.* Western I. L. W. Co., 2 J. R., 286. 10 Coke, 130. Willes Rep., 443. 5 Bac. Abr., 249.

† Salmon *vs.* Smith, 1 Saunders, 207, n. 2. Hill *vs.* Goodchild, 5 Burr., 2790. Mitchell *vs.* Milbank, 6 T. R., 199. Brown *vs.* Allen, 4 Esp., N. C., 158. Bohun *vs.* Taylor, 6 Cowen, 318. Wakely *vs.* Hart, 6 Bin., 316, 319. Bostwick *vs.* Lewis, 1 Day, 24. Crawford *vs.* Morris, 5 Grattan, 90.

‡ Holly *vs.* Mix, 8 Wend., 350.

So, if against three defendants, one demurs, another makes default, and a third joins issue; on the trial, several damages shall be assessed against those who demur and make default.\* Where there is a demurrer to evidence and a joinder, the court may have the damages assessed by the jury conditionally, or they may discharge the jury, leaving the damages to be assessed by another jury, should the demurrer be overruled.†

In a joint action of assault against husband and wife, and evidence of a separate assault by the husband alone, the plaintiff cannot recover damages for such separate assault.‡

It has been held in England, that where a verdict is taken at nisi prius, subject to the award of an arbitrator, to whom all matters in difference are referred, he cannot award a greater sum than that for which the verdict was taken. But this does not apply to the action of debt.§

There was formerly, in England, a charge on the plaintiff's judgment called *damage clear*, which was a payment required to be made of twelve pence in the pound: but it seems to have been long since abolished; for in an early case it appears that the court "thought it hard that the plaintiff should be stopt of his judgment till he had paid his damage clear," and they resolved to amend it.¶

\* Com Dig. Damages, E. 5. *Chapman vs. House*, T. 18 G. II., Str. 2, 1140.

Many curious cases, as to assessing damages, may be found in *Viners Abr.*, tit. *Damages*, C. and D. But the actions being obsolete, or the cases in themselves peculiar and extraordinary, it would be out of place to take further note of them here.

As to writs of inquiry for assessment of damages, much law is to be found in *Vin. Ab.*, Damages, D. a., but it does not properly belong in this place.

In New York, in an action against several, if one pleads to issue and another suffers judgment by default, damages must be assessed against both at the same time, by the jury who try the issue. *Van Schaick vs. Trotter*, 6 Cow., 599.

On a *venire tam quam*, to try an issue as to one count, and assess contingent damages on demurrer to others, if the plaintiff be non-suited as to the issue, he cannot proceed to assess contingent damages on the counts demurred to. *Packard vs. Hill*, 7 Cow., 434.

In the same State, the damages can be assessed by the clerk, on promissory notes, bills, &c., but not on the common counts nor unliquidated demands; and in regard to this, several cases have been decided. *Burr vs. Waterman*, 2 Cow., 36. *Colden vs. Knickerbacker*, 2 Cow., 31. *Rogers vs. Coleman*, 3 Cow., 62. *Beard vs. Van Winkle*, 3 Cow., 335. *Seeber vs. Yates*, 6 Cow., 40.

† *Bull N. P.*, 314. 2 *Tidd's Pr.*, 786. *Andrews vs. Hammond*, 2 Blackf., 540.

‡ *Goddard vs. Hart*, 5 Gilman, 95.

§ *Bonner vs. Charlton*, 5 East, 139. *Annan vs. Job*, Nov. 14 and 16, 1846, *London Jurist*, Vol. x., 1088. *Pearce vs. Cameron*, 1 *Mees. & W.*, 676, is also cited in the last case, but I cannot find it.

¶ *March's Reports*, 76.

The other questions in regard to damages relate principally to the subject of costs; and indeed, in the early periods of the English jurisprudence, damages and costs, *damna et custagia* were convertible terms;\* but the questions which regard the relation of damages to costs, though extremely important in practice, are so local in their character, and depend so much on statutes, that it would be inexpedient here to do more than advert to them.

In England, a petition of right is said to be maintainable for no other objects than land or specific chattels, certainly not for a sum of money claimed either as debt or by way of damages.†

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\* *Zink vs. Langton, Doug.*, 751.

† *Baron De Bode's Case*, 8 Q. B., 208; where the authorities are stated at large.

If a demurrer to a declaration in a suit by drawer against acceptor be overruled, the court may, in Indiana, assess the damages so far as the amount due on the bill is concerned; but as to the costs of the protest, if chargeable at all, there must be a jury. *Phipps vs. Addison*, 7 Blackf., 375.

In the same State, in debt on a sheriff's bond upon the execution of a writ of inquiry, after a demurrer to the replication assigning breaches has been overruled, the *quantum* of the relator's damages is the only subject of inquiry. *Clark et al. vs. The State*, 7 Blackf., 570.

## CHAPTER XXV.

### OF DAMAGES WITH REGARD TO EVIDENCE.

- As a general rule the plaintiff is not allowed to testify—Exceptions in which he is admitted to give evidence. The witness is to testify only as to facts, and not as to opinions—Exception in case of experts—in case of value. Doctrine of Presumptions. Frequent necessity of being content with imperfect and unsatisfactory proof.

WE have now to consider the mode of proof by which claims to damage are substantiated. The rules which govern evidence as applied to fix the measure of relief, are neither numerous nor complex, but they deserve very careful attention.

We have seen\* that in the early stages of the civil law, the plaintiff was allowed to fix the amount of the compensation to which he conceived himself entitled, subject only to the restraining hand of the *judex*. With us, the rule is carried to the other extreme, and as a general principle of the common law, neither party to the record is allowed to give testimony in any branch of the case.† But to this general rule certain exceptions have been introduced.

The oath of the party is admitted in respect of a lost deed, or other paper preparatory to the introduction of secondary evidence to prove its contents. So, too, in complaints under the bastardy acts, the oath of the female is admitted to charge the defendant with the paternity of the offspring. So, again, the rule has been relaxed in order to prove the amount of compensation to which a party is entitled; thus the oath of the

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\* Supra, 80.

† In England, in an action of tort, where one defendant joins issue and the other lets judgment go by default, the party who has suffered judgment may give evidence for the plaintiff if he has no other interest than can be inferred from the fact of his being a party to the record. *Haddrick vs. Healop, et al.*, 12 Q. B., 267. A party to the record as such is no longer, in England, incompetent to testify. *Worrall vs. Jones*, 7 Bing., 395.

plaintiff is admitted in many States of the Union to prove the truth of entries in his books, of goods delivered in small amounts, or of daily labor performed, when the party, from his situation, has no evidence but the accounts kept by himself, and where, as a general thing, from the nature of the traffic or service he cannot have. So, too, where robberies or larcenies have been committed, and no evidence exists but that of the party robbed or plundered, he has been admitted as a witness to prove his loss; for it is said that in these cases the party injured shall have an extraordinary remedy, *in odium spoliatoris*. On this ground in an action against the Hundred under the English statute of Winton, the person robbed was admitted as a witness to prove his loss and the amount of it.\* So, too, in Pennsylvania, in an action against the county for the destruction of property by a mob, the plaintiff may prove her ownership and the value of wearing apparel destroyed,† but not the destruction of household furniture, because there the argument *ex necessitate* does not apply.‡ So, also, in equity, where a man ran away with a casket of jewels, the party injured was admitted as a witness.§ So, too, when the defendant, a shipmaster, broke open and plundered the plaintiff's trunk, the latter was allowed to testify to the contents of the trunk.]

An effort has been made in Pennsylvania to extend this exception to all cases of passengers by public conveyances, where there is no criminal nor even any tortious act committed by the defendant beyond mere negligence; and it has been said that in such cases the plaintiff may testify from necessity.¶ But in Massachusetts this has been denied; the old and salutary principle has been adhered to, and in a case of mere negligence, it has been decided that the plaintiff is not competent, even though he has no other testimony as to the amount of his loss.\*\*

Another general rule which pervades all our law, is that

\* Bul. N. P., 187. Porter *vs.* Hundred of Reyland, Peake's Add. Cases, 208. Snow *vs.* Eastern Railroad Co., 12 Met., 44.

† County *vs.* Leidy, 10 Barr., 45; see, also, Clark *vs.* Spence, 10 W., 335. McGill *vs.* Rowand, 8 Barr, 451.

‡ Ibid.

§ East India Co. *vs.* Evans, 1 Verm., 308.

¶ Herrman *vs.* Drinkwater, 1 Greenl., 27.

¶ Whitesell *vs.* Crane, 8 Watts & Serg., 369.

\*\* Snow *vs.* Eastern R. R. Co., 12 Met., 44.

the witness is to testify only to facts. He is to speak as to the facts which he has heard or seen. His opinion is not to be given, for it is the opinion of the jury on the testimony which forms the verdict and decides the case. But to this rule again there are many important exceptions. So pedigree is often proved by the hearsay of the family. So handwriting is proved by the opinions of those familiar with the signature of the party. So too, the witness has been allowed to state his opinion in cases of criminal conversation, to show the state of the affections of the parties.\* And on similar grounds in cases of breach of promise of marriage. In an action of the latter description, the Supreme Court of New York said: "We do not see how the various facts upon which an opinion of the plaintiff's attachment must be grounded, are capable of specification, so as to leave it like ordinary facts as a matter of inference to the jury. It is true as a general rule, that witnesses are not allowed to give their opinions to a jury; but there are exceptions, and we think this one of them. There are a thousand things indicating the existence of degrees of the tender passion which language cannot specify. The opinions of witnesses on this subject must be derived from a series of instances passing under their observation, which yet they never could detail to a jury."† So, too, evidence of this kind has been admitted in cases of insanity, but it has been pronounced by a very able judge "the most unsatisfactory and the least to be depended on."‡

The general rule which requires a witness to speak to facts within his knowledge, is applied to the subject of compensation; the damage must be proved like any other fact in the cause, and no testimony amounting to mere opinion is competent. So in New York, a witness cannot be allowed to give his opinion as to the amount of damages sustained by a party in consequence of a mill lying still.§ So, the opinions of witnesses as to the amount of damages caused by the deprivation or withdrawal of water from a tavern, are inadmissible.¶ So, too, on

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\* *Trelawney vs. Coleman*, 2 Starkie, 168, 191.

† *McKee vs. Nelson*, 4 Cow., 855.

‡ *Clark vs. Fisher*, 1 Paige, 171.

§ *Doolittle vs. Eddy*, 7 Barb. S. C. R., 75.

¶ *Harger vs. Edmonds*, 4 Barb. S. C. R., 256. *Giles vs. O'Toole*, 4 Barb. S. C. R., 261.

ascertaining the injury caused by an alleged nuisance, a witness cannot give his opinion as to the amount of damage.\*

So in an action for the breach of a covenant contained in a lease, that the defendant would not let any other mill site on the same stream, it was held not proper to admit witnesses to testify their opinion as to the amount of damage which the plaintiffs had sustained by the erection of the rival site, and a new trial was ordered.† And the correctness of the principle laid down in this case has been very recently affirmed.‡

On the same ground, and with still stronger reason, it has been decided in Ohio, that a person who is present during the trial of a cause, and has heard witnesses describe the manner in which a ford is injured by the erection of a dam across a stream of water below it, is not competent to give his opinion of the damages sustained by the party injured.§ So, intelligent merchants, well acquainted with the plaintiff and his business, were held not competent to give an opinion as to the damage of the plaintiff in being deprived of the advantage of his own care and oversight.||

To the general rule that the witness' opinion cannot be received as to the amount or character of injury sustained, there are, however, some considerable exceptions. Of these, perhaps the most comprehensive and important is that which admits persons of science, or experts in any profession, to testify as to their opinion on a given state of facts relating to matters in regard to which their education gives them peculiar capacity for forming a correct judgment.¶

So in Massachusetts, on the trial of an action to recover damages for injury done to the plaintiff's garden and nursery by smoke, heat, and gas proceeding from the defendant's brick kiln, two gardeners who had had much experience in raising and cultivating fruit trees, shrubs, and plants, and who had testified to the particulars of the plaintiff's injury, were allowed to give their opinion as to the amount of damage. And the Court say: "It seems to us that it would be impracticable to dispense with

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\* *Fish vs. Dodge*, 4 Denio, 811.

† *Norman vs. Wells*, 17 Wend., 187, 161.

‡ *Fish vs. Dodge*, 4 Denio, 811, 818.

§ *Shepherd vs. Willis*, 19 Ohio, 142.

|| 28 Wend., 431; 17 Wend., 161; 24 Wend., 668; 21 Wend., 842.

¶ *Folks vs. Chad*, 8 Doug., 157.

this species of testimony in many actions for trover for personal property, where no detail of facts could adequately inform the jury of the value of the article. The opinion of a witness as to the value of a horse is much more satisfactory evidence than a detailed statement of his size, color, age, &c., to give the jury the requisite information to enable them to assess damages for the conversion of a horse.”\* So in an action on a building contract, a mason may be asked how long, in his opinion, it would take to dry the walls of a house so as to render it fit and safe for human habitation.†

But this exception is generally strictly limited to the case of experts in matters of art and skill, and is not enlarged so as to admit opinions in ordinary cases, where the jury may be supposed competent to form their judgment from the statement of the facts. Nor where the opinion necessarily degenerates into mere conjecture. So, in an action for negligently injuring and sinking a canal boat, a boatman who knew the boat in question previous to her being injured, and swore that he had raised sunken boats and repaired them, cannot testify as to his opinion of what the damages would be, from the description of the situation of the boat by the witnesses.‡

In an action on the case against a railroad company for injury to the person of a passenger through the negligence of the company, evidence of loss sustained by the plaintiff in his business in consequence of the injury received, is proper to aid the jury in estimating the plaintiff's damages; and for that purpose the nature of the plaintiff's business, its extent, and the importance of his personal oversight and superintendence in conducting it, may be shown, but the opinions of witnesses as to the amount of loss are inadmissible.§

A party in the City of New York, whose property is destroyed by the order of the city officers to stop the spread of a conflagration, is entitled to an allowance to the full value of the property destroyed, without any deduction for the amount insured and interest on it; but the opinions of bystanders that the building destroyed would have been consumed by the fire

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\* *Vandine vs. Burpee*, 18 Met., 238.

† *Smith vs. Gugerty*, 4 Barb. S. C. R., 615.

‡ *Paige vs. Hazard*, 5 Hill, 608.

§ *Lincoln vs. Saratoga & Sch'y R. R. Co.*, 23 Wend., 425.



if they had not been blown up, are inadmissible. It was, however, suggested that perhaps the opinion of firemen and others, having particular knowledge and experience with reference to fires, might be received.\*

Another exception to the rule which excludes mere opinion, is that which permits testimony to be offered as to the value. Witnesses familiar with the article in question are permitted to state their opinion as to its value,†—and that in its actual or in an assumed and hypothetical state. And so as to the value of services.‡ So, in an action for a nuisance, an architect, acquainted with the locality, may be asked if the nuisance depreciated the value of the houses in the neighborhood.§

The question of damages is often governed by the doctrine of presumptions. Presumptions are sometimes absolute and not to be rebutted by any proof; in other cases they only rise to the force of *prima facie* evidence, and may be met and contradicted like any other testimony. So where the plaintiff shows himself to have sustained damage resulting from the act of the defendant, which act with proper care does not ordinarily produce damage, he makes out a *prima facie* case of negligence, which cannot be repelled but by proof of care, or some extraordinary accident which makes care useless.¶ So in case against a railway company, for setting fire to premises adjoining their line, the fact of premises being fired by sparks emitted from a passing engine is *prima facie* evidence of negligence on the part of the company, rendering it incumbent on them to prove that precautions had been adopted reasonably calculated to prevent such accidents.¶

So, again, the acts of the parties themselves may determine the value of the thing in controversy, and operate like an absolute liquidation of damages. So, in an action on an agreement in which the defendant acknowledged that he had received of the plaintiff certain enumerated goods, attached by the plaintiff as a deputy sheriff, estimated at fifteen hundred dollars,

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\* The Mayor *vs.* Pentz, 24 Wend., 668.

† Joy *vs.* Hopkins, 5 Denio, 84.

‡ Brill *vs.* Flagler, 28 Wend., 354.

§ Gauntlett *vs.* Witworth, 2 Car. & Kir., 790.

¶ Ellis *vs.* Ports. & Roan. R. R. Co., 2 Ired., 188. Herring *vs.* Wilmington & Raleigh R. R. Co., 10 Ired., 402.

¶ Pigott *vs.* Eastern Counties Railway, 8 Man. Gr. & Scott, 229.

and which the defendant promised to keep safely and deliver to the plaintiff on demand; it was held that the defendant could not give evidence that the goods were of less value than the specified sum, but that the valuation in the receipt was conclusive.\*

We have seen that in regard to contractors for public works, who are in certain cases allowed their profits, the sub-contracts made by them are not evidence to show what those profits would have been, but they are required to go into a minute investigation as to the cost of materials, the expense of delivery, the amount and value of labor, and even with all these it has been said that the estimate of profits must be conjectural.†

The application of the rules which we have thus examined, in regard to the proof necessary to establish a claim for damages, often renders it difficult if not impossible to arrive with precise accuracy at the object of the inquiry. But justice is after all but an approximative science, and its ends are not to be defeated by a failure of strict and mathematical proof. The following language of Mr. Justice Story is full of good sense and susceptible of frequent and wide application :

“ It is said, that it is difficult, and indeed impracticable, to ascertain the true and exact value of the property in this case. There may be difficulty, and perhaps an impossibility, to ascertain its exact and minute value, for we have no means of weighing it in scales, or fixing its positive price. But the same difficulty occurs in many other cases of insurance; as in cases of injuries to sails or rigging or spars, by tempest, or by cutting them away in cases of jettison; and yet, no one doubts that they must be contributed for according to their value, ascertained by a jury in the exercise of a sound discretion, upon proper evidence. Suppose that fruit is insured, and the vessel has a long passage, in which, by ordinary waste and decay, it must suffer some deterioration; and then a storm occurs, in which it suffers other positive damage and injury, or there is a jettison thereof—how are we to ascertain what diminution is to be attributed to natural waste and decay, and what to the perils of the seas? or what was its true value at the time of the jettison? There can be no positive and absolute certainty. The most that can be done is to ascertain, by the exercise of a sound judgment, what, under all the circumstances, may reasonably be attributed to one cause, and what to the other. Absolute certainty, in cases of this sort, is unattainable. All that we can arrive at is an approximation thereto; and yet no man ever doubted that such a loss must be paid for if it is covered by the policy.”‡

\* Jones *vs.* Richardson, 10 Met., 481.

† Masterton *vs.* Mayor of Brooklyn, 7 Hill, 62. Seaton *vs.* Second Municipality, 3 La. R., 45.

‡ Rogers *vs.* Mechanics' Ins. Co., 1 Story, 800.

## CHAPTER XXVI.

### POWER OF THE COURT OVER THE SUBJECT OF DAMAGES.

Respective powers of court and jury over the subject of damages—General division of their functions—The Roman system in this respect—Curious analogies between it and the English system—General rule with us is that the court decides questions of law, and the jury questions of fact—Exceptions—Verdicts against the weight of testimony—Setting aside verdicts on account of excessiveness of damages—Power of the court exercised with hesitation and reluctance—Measure of damages a question of law.

WE have thus stated the general principles which control the subject of compensation, when redress is governed by strict rules of law; and when the matter is said to be left to the discretion of the jury.

An important branch of the subject, however, still remains. As the final decision of every case involving an issue of fact, is pronounced by the jury in giving their verdict, and as that verdict also expresses the amount of compensation which the party in fault is to make, it is plain that unless the court retain to itself some control over the action of the jury, their power over the subject of remuneration would be practically unlimited. We have, then, yet to see what remedy is provided if the jury disregard the rules laid down for their government; and this necessarily brings us to a consideration of the relative powers of the judge and the juror.

One of the most marked peculiarities of the Anglo American system of jurisprudence, perhaps its most striking feature, is that division of power by which the decision of questions of law is given to the court, and that of questions of fact to the jury. It is an error to suppose that this division is altogether peculiar to our system, or that it is exclusively of English origin. The recent labors of the German scholars, assisted by the dis-

covery of Gaius in 1816, have disclosed the true nature of the procedure by the *formula* in the republican period of the Roman jurisprudence; and the analogies that it furnishes on the present branch of our subject, are too striking to be overlooked.

The despotism of Augustus and his successors introduced changes into the administration of justice analogous to those which it wrought in the general frame-work of the imperial government. Its peculiar characteristics were centralization and despotism; it established in all branches of the system a gradation of ranks, deriving their existence from and dependent upon the will of the emperor alone, and it destroyed every vestige of popular action. The first and most important of these changes in the machinery of the law, was, by abolishing the *judices* or jurors, to make the judges absolute masters of the whole cause, subject only to the right of appeal, which, in all cases I think, might carry the suitor before the Cæsar himself; and this led directly to the adoption of written and secret instead of oral and public discussion. Thus was produced the system which in its general outline, ruled continental Europe almost exclusively till the adoption of the Code Napoleon.

But the plan on which justice was administered at Rome in the time of Cicero, perhaps the most truly great period of its development, was very different. The Romans during their republican epoch were too jealous of power to give to the judiciary an uncontrolled authority over questions both of law and fact. The judicial functions were divided as with us, by an analogous, and in some cases by an identical line. The suit was instituted before a magistrate, usually the Prætor, and the proceedings before him were termed *in jure*. Here the cause of action was stated, the defense set up, and the issue whether of law or of fact formed. In other words, the pleadings were put in. To this issue was then joined the instructions proper for its trial, and the issue and instructions together were termed the *formula*. A *judex* or referee was then appointed. This was called *datio judicis*. The cause was then turned over to him, and he decided the question submitted to him according to the instructions contained in the *formula*. The proceedings before him were termed *in judicio*.

The *formula* succeeded the old *legis actiones*, which by

their technical severity had become odious. These forms were abolished and the *formula* introduced by the *Lex Æbutia*; the precise date of which is uncertain, but the better opinion would seem to be that it was passed early in the seventh century of the city, or not long before the period of Cicero.\*

The *formulae* were of two kinds according as they turned on questions of law or questions of fact, *formulae in jus conceptæ*, and *formulae in factum conceptæ*. A single instance of the latter kind, will sufficiently exhibit their character. *Judex esto; si paret A. Agerium apud N. Negidium mensam argenteam deposuisse, eamque dolo malo N. Negidii A. Agerio redditam non esse, quanti ea res erit tantum pecuniam judex N. Negidium A. Agerio condemnato; si non paret, absolve.* Which may be thus rendered: Let this cause be referred to — If it shall appear that A. Agerius deposited a silver table with N. Negidius, and that through the fraud of the latter, it has not been returned to the owner, let the judge condemn N. Negidius to pay to A. Agerius its value. If it shall not so appear, let him decide for the defendant. This is precisely such a charge as might be given to a jury any day in an English or American court.

There is a passage in Cicero, where, while denouncing the perversion of the administration of justice under Verres in Sicily, he gives a very striking picture of the uses and abuses of this division of the judicial functions.† “No one,” he exclaims, “can hold or recover his house, his estate, his paternal property, if, when they are sued for, a dishonest prætor from whom there is no appeal, appoints any one whom he pleases judge; or if a profligate and worthless judge decides what the prætor orders; or if, again, the prætor so frame the order (*formula*) that not even the wisest and best judge can decide otherwise. If, for instance, he appoint L. Octavius (an unexceptionable man) *judex*, with the formula, *if it shall appear that the property in controversy belongs to P. Servilius, order him to deliver it to Catulus*,—is not Octavius forced to compel Servilius to deliver the property to Catulus, although it do not belong to him?” This is precisely what might occur under our procedure,

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\* Gaius by Heff., cap. VII., 23.

† In Verr. II., L. 2, § 12.

if the judge were corrupt; and, without any corruption, it is precisely the error which the system of exceptions to the charge is intended to correct.

The formula thus took the place of our charge to the jury. As that charge does, it stated hypothetically the verdict or judgment to be rendered, and gave the instructions according to which the issue should be decided. The only material difference is, that it was in some cases given before the witnesses were heard. The state of facts was therefore assumed to appear correctly in the allegations of the parties; and the instructions of law arising on these facts were given before the testimony was taken. This may now appear awkward and inconvenient, but does not in principle differ from our own mode.

This system was, as has been already said, effaced by the despotism of the empire. The independence of such a judiciary was, of course, hostile to that centralization which was the essence of the imperial organization; the *judices* were abolished, and the decision of the entire cause given to the court alone. This resulted in the abolition of all oral discussion; and such was the system in force at the time when the Institutes of Justinian condensed and embodied the Roman law. Such, too, was the system which was adopted when civilization resumed its progress in continental Europe, and so it remained till the French reforms introduced the jury in certain cases.

In the meantime, however, in that island and among that great people from whom we derive our origin, a system analogous to the Roman system in its best days had grown up; a system of unknown origin, whether a relic of Roman or a child of German liberty it is perhaps impossible now to say, but marked by very peculiar and distinct features, and claiming as its chief merits two great principles, oral and public discussion, and a division of the judicial functions between the court and the jury. It is of this latter system and its changes that I now propose to speak.\*

It is very plain from the early records of our jurisprudence,

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\* Nor is the division of power between the magistrate and the *judex* the only important analogy between the Roman and the English systems of jurisprudence. Two different and distinct bodies of law, as distinct and different as common law and equity with us, existed in the early days of the Roman system. "La civilization Romaine," says Troplong, "s'est développée sous l'influence de deux élémens qu'on pourrait en

imperfect as they are, that the relative powers of the court and the jury were at first very loosely defined, and that many important changes and modifications have been from time to time introduced. So, originally, the jurors were the witnesses themselves, and found their verdict on their own knowledge of the facts. So the court in many cases of default and demurrer, took the disposition of the facts of the case to themselves and pronounced the judgment. And on the other hand in a very large class of cases, not falling within those in which exemplary damages may be claimed, the jury exercised an almost unlimited control over the subject of remuneration\*.

Thus it was at one time held that the court could dispose of the case if the plea were sent to be tried in a foreign country, for the jury there had not full knowledge of the fact.\* And so where the court could increase damages, it was held they could mitigate them.† So also, in an early author it is said, that "though the justices use to award inquest of damages when they give judgment by default, yet they themselves may

quelque sorte appeler de première et de seconde formation, et qui ont vécu ensemble dans une longue alternative de lutte et de rapprochement, jusque ce que le temps ait amené leur fusion plus ou moins complète. \* \* Sa formule la plus large et la plus haute c'est le *jus civile* et l'*aquitas* sans cesse opposés l'un à l'autre comme deux principes distincts et inégaux." De l'Influence du Christianisme sur le Droit Civil des Romains, par M. Troplong, Chap. III.

We are sadly in want of some competent work on the procedure of the Roman system, showing its curious analogies with our own. The subject has been elaborately treated by several German authors, among the best of whose works are *Das Römische privat Recht*, by Rein; *Geschichte des Römischen Rechts*, by Walter; *Gerichts Verfassung und Prozess des sinkenden Römischen Rechts*, by Bethman Hollweg; but neither in England nor this country has the subject received any careful attention since the discovery of Gaius, in 1816; if I except the excellent articles of Mr. Long, in the recently published Dictionary of Antiquities. Mr. Long has evidently made himself master of the subject, but his articles are only *disiecta membra*; and I could wish to see it systematically and elaborately discussed by some person equally familiar, if possible, with the Roman and English jurisprudence. It is one full of interest to the general as well as the legal scholar; it is calculated to throw much light on many of the most interesting questions in the annals of Rome, and is worthy of the attention not less of the historian than of the juriconsult. But it cannot be done without a very thorough familiarity with the actual operation of both systems as well of the common as of the civil law. And, perhaps, other things\* being equal, it would be most satisfactorily treated by one who was acquainted with the practical working of popular institutions in a state of extreme development, who had seen and understood their defects and their advantages; their irregular and often convulsive action; their fierce passions; their vast energies and generous impulses.

\* 1 Rol., 572, l. 50.

† 1 Rol., 572, l. 25-28; 573, l. 7.

tax the damages if they will.\* So, too, from another early case where judgment was given by default, it seems clear that the judges originally might award damages without the intervention of a writ of inquiry.† So, too, on demurrer, and in actions of debt, the sum being certain, this power seems to have been exercised at a much later day.‡

The following case shows the unsettled condition of the law in the respect we are now considering. A motion being made to increase damages, because the jury had only given 12 pence, whereas the plaintiff's arm was broke; Rolles, C. J., refused because it did not appear by the declaration what manner of maiming it was that he received.§ It was early decided, however, that the justices of nisi prius could not increase the damages,|| nor the court on the certificate of the justices of nisi prius.¶ And we have seen other cases, where the jury were declared to be chancellors and to have entire power over the subject of relief. But the fluctuations and oscillations of the system have been gradually corrected and brought under fixed rules. The progress of time and the accumulation of experience, enable us now to draw the lines of demarkation with great clearness, and the complication of the machinery disappears when carefully examined.

The first leading proposition on which the whole structure of our system depends is, that the court decides all questions of law. Statutes are expounded, contracts interpreted, written instruments construed, evidence admitted or excluded by the

\* Viner Abr., Dam. I.

† So says Brooke, Dam. Pl. 55, le def fist default et le pl. recouer dam. a 1111, l. taxe p. la court et ne dam come il court, quod nota q. le court m taxa les Damages.

‡ P. 56, car sur demur. in ley le court post agard damag sans inquire de ceo p. curiam qd. nota. Vide, also, pl. 69-68, 194. See Sayer on Damages, Ch. XX., 105. Holdip vs. Otway, 2 Saund., 207; 21 Car., 2; Sayer, 107.

§ Jervis vs. Lucas, Styles, 345, 1652.

There seem to be some cases in England where the court still exercises a direct control over the verdict. So, in some instances, on bills of exchange, the court assesses the damages without the intervention of a jury. Robinson vs. Reynolds, 2 Adol. & El. N. S., 207; and see Clement vs. Lewis, 3 Br. & B., 297.

So in cases of mayhem, the courts exercised the power of altering and even increasing the verdict. Thus, where a verdict had been found for the plaintiff of £150, and it was moved to increase the damages, Lee, C. J., said, "there is no doubt but the court can increase the damages in this case, even upon view of the party maimed." But they held the £150 sufficient, and discharged the rule. Brown vs. Seymour, 1 Wilson, 5. See, also, Baynes vs. Haydock, 1 Rol., 572.

|| 1 Rol., 573, l. 20.

¶ 1 Rol., 572, l. 20.



court and by the court alone.\* And it necessarily follows from this that if the jury disregard the instructions of the court on any question of law, their verdict will be set aside. It is by the exercise of this power alone that the control of the court over questions of law can be preserved.

The correlative proposition to this is, that the jury decides all questions of fact. Where the facts are admitted the rights of the parties must depend on a pure question of law, and they are of course under the control of the court; but the instant that an issue of fact is presented the decision of the cause passes from the court to the jury. The principle is, indeed, carried so far, that in some States of the Union, as in Texas, the court is not even allowed to charge them as to the weight of testimony.† The rule giving the jury the decision of all questions of fact, if no exception were admitted, would, as has been said, effectually make the jury masters of the whole matter in controversy. Various modifications have therefore been introduced to it, which we now proceed to consider. In the first place, a verdict may be set aside because it is against the weight of testimony. This power is, however, very sparingly exercised, and on mere questions of fact the court always interferes with great hesitation and reluctance. So, a verdict will not be disturbed merely because it appears that the jury have reasoned incorrectly. In a recent case in the English Common Pleas, Maule, J., said, "We are not, however, to set aside a verdict because the jury one *or all* of them may have reasoned inconclusively. If such a doctrine were to prevail scarcely any verdict would stand. The trial by jury is not founded upon a supposition so absurd as that the whole twelve will reason infallibly from the premises to the conclusion."‡

So again, where the judge who tries a cause in trespass, recommends a verdict for nominal damages, but the jury give substantial damages (£5) such a verdict will not be set aside as perverse.§ And this rule has been repeatedly affirmed in this country. So in Mississippi, it has been decided that a verdict will always be permitted to stand unless it is opposed by a decided

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\* U. S. *vs.* Hodge et al., 6 Howard, 279.

† Nels *vs.* The State, 2 Texas, 282.

‡ Smith *vs.* Dobson, 8 Scott N. R., 836.

§ Chilvers *vs.* Greaves, 5 Man. & Gr., 578

preponderance of the evidence, or is based on no evidence whatever;\* and in Texas, that the verdict of a jury founded on conflicting testimony will not be set aside unless it be very apparent that they decided wrong.†

The court again holds itself at liberty to set aside verdicts and grant new trials, in that class of cases where there is no fixed legal rule of compensation, whenever the damages are so excessive as to create the belief that the jury have been misled either by passion, prejudice, or ignorance. But this power is very sparingly used, and never except in a clear case. So in an action for malicious indictment of the plaintiff for perjury, where a verdict of £400 was obtained, on a rule for new trial it was insisted that the verdict was excessive. But it was refused, and Lord Mansfield said, "New trials are not to be granted in this class of cases without very strong grounds indeed, and such as carry internal evidence of intemperance in the minds of the jury."‡

The doctrine has been repeatedly affirmed in this country. So Mr. J. Story has decided, that in cases of *tort* the verdict will not be disturbed unless it is so excessive or outrageous with reference to all the circumstances of the case, as to demonstrate that the jury have acted against the rules of law, or have suffered their passions, their prejudices, or their perverse disregard of justice, to mislead them.§ So again, the same sagacious Judge has said, "A court of law will not set aside a verdict upon the ground of excessive damages, unless in a clear case, where the jury have acted upon a gross mistake of facts, or have been governed by some improper influence or bias, or have disregarded the law."¶ Again, in another case Mr. Justice Story said, "The damages are certainly higher than what, had I sitten on the jury, I should have been disposed to give, and I should now be better satisfied if the amount had been less. \* \* It is one thing for a court to administer its own measure of damages in a case properly before it, and quite another thing to set aside the verdict of a jury merely because

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\* *Cicely vs. State of Mississippi*, 13 Smede & M., 202.

† *Perry vs. Robinson*, Adm'r, 2 Texas R., 490.

‡ *Gilbert vs. Burtenshaw*, Cowper, 280.

§ *Whipple vs. Cumberland Man'g. Co.*, 2 Story, 661.

¶ *Wiggin vs. Coffin*, 3 Story, 1.

it exceeds that measure. The court, in setting aside a verdict for excessive damages, should clearly see that they are excessive; that there has been a gross error; that there has been a mistake of the principles upon which the damages have been estimated, or some improper motives, or feelings, or bias which has influenced the jury. \* \* Upon a mere matter of damages, where different minds might and probably would arrive at different results, and nothing inconsistent with an honest exercise of judgment appears, I, for one, should be disposed to leave the verdict as the jury found it.”\*

So in New Jersey, too, it has been declared that the court, in actions of trespass for personal torts, where damages can be gauged by no fixed standard, but necessarily rest in the sound discretion of the jury, interferes with a verdict on the mere ground of excessive damages with reluctance, and never except in a clear case.†

The forbearance of the court to interfere with the jury is so great that, in actions of tort, the general rule is, that a new trial will not be granted for smallness of damages.‡ But it seems that if the jury so far disregard the justice of the case as to give no damages at all where some redress is clearly due, the court will interpose. So where, in case for negligence for defendant's servant driving against the plaintiff, it appeared that the plaintiff's thigh was broken, and considerable expense incurred for surgical treatment. The plaintiff obtained a verdict; damages *one farthing*. A new trial was granted on payment of costs, and Lord Denman said, “A new trial on a mere difference of opinion as to amount may not be grantable, but *here* are no damages at all.”§

Although it is conceded that the courts have the power of granting a new trial in cases of *crim. con.*, still it seems that the power has never been exercised.¶ Even in cases where rules of

\* *Thurston vs. Martin*, 5 Mason, 197.

† *Berry vs. Vreeland*, 1 Zabriskie, 188.

‡ *Lord Townshend vs. Hughes*, 12 Mod., 150. *Rendall vs. Hayward*, 5 New Cases, 424. *Maurioet vs. Brecknock*, 2 Doug., 509. *Hayward vs. Newton*, 2 Strange, 940. *Barker vs. Dixie*, 2 Strange, 1061. 21 Vin. Abr., 486, Trial, Y. G. Lord Gower *vs. Heath*, Barnes' Notes, 445. *Regina vs. Justices of West Riding*, 19 B., 624, 631.

§ *Armitage vs. Haley*, 4 Q. B., 917. See, also, *Cook vs. Beal*, 1 Ld. R., 176; S. C., 3 Salk., 115. *Brown vs. Seymour*, 1 Wils., 5. *Austin vs. Hilliers*, Hard., 408.

¶ *Duberly vs. Gunning*, 4 T. R., 656. *Smith vs. Masten*, 15 Wend., 270.

law have been disregarded, or where for any reason the verdict cannot be supported, the power of the court to set aside the decision of the jury will not be exercised without regard to the justice of the case. So, where a verdict was obtained for principal and interest, as to which latter the defendant was clearly liable, but there being no count adapted to it the verdict was not strictly regular, the court nevertheless refused to set it aside, saying, "In motions for new trials, the court may fairly endeavor to do that which advances the justice of the case; and by refusing this rule we only save the defendant from paying with the tremendous amount of accumulated costs, what he is in justice bound to pay at once."\*

Thus, again, where the jury have given such excessive damages that the court feel bound to set aside the verdict, they will, instead of simply ordering a new trial, give the plaintiff the option of reducing the verdict to the sum which the court considers reasonable, and on his remitting the excess will deny the motion for a new trial, and this in actions of tort as well as on contract.† Or the court may send the cause back to a second jury on the quantum of damages alone.‡

A question has presented itself as to the mode in which the jury may arrive at the quantum of damages in cases where they are greatly divided on the question of amount; and it has been decided that if they *agree beforehand* that each juror shall mark the sum to which he conceives the plaintiff entitled, and that the total of these amounts divided by twelve (the number of jurors) shall be the verdict, the whole proceedings will be void, and a new trial will be ordered, for the reason that the whole thing is a mere matter of chance. So in New York, it has been decided that the jury will not be allowed to arrive at a verdict by each of the jurors marking down a particular sum and then dividing the whole amount by the number of jurors, and on assignment of error in fact, the judgment for this cause will be reversed.§ So in England, the court will not permit the jury to arrive at a verdict by splitting a difference.¶ But if

\* *Harrison vs. Allen*, 2 Bing., 4.

† *Dublin vs. Murphy*, 3 Sandford S. C., 19. *Guerry vs. Keston*, 2 Rich. R., 507. *Young vs. Englehard*, 1 Howard Miss. R., 19.

‡ *Boyd vs. Brown*, 17 Pick., 458.

§ *Harvey vs. Richell*, 15 J. R., 87, and *Roberts vs. Fallis*, 1 Cowen, 288.

¶ *Hall vs. Peyser*, 18 Mees. & W., 600.

the same course be taken in order to ascertain with more accuracy how the jury stands, the rule is different and it has been held not improper for them to arrive at their verdict by each marking a sum and dividing it by twelve, provided they do not previously bind themselves to adhere to the result of the arithmetical computation.\*

To the other rules which we have thus briefly enumerated, intended to maintain the dignity of the law and the harmony of the administration of justice, is finally to be added that to which we have had so frequently to refer in these pages—that the measure of damages is a matter of law to be decided by the court; and that whenever it shall appear that the jury have disregarded the instructions of the bench in this respect the verdict will not be permitted to stand.

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\* *Fowler vs. Colton*, Wisconsin Reports by Barnett, 178.

## CONCLUSION.

WE have in the preceding pages taken a survey of the subject of compensation as awarded by the legal tribunals known to English and American jurisprudence. But much of the great demesne of justice still remains unexplored. The Courts of Admiralty, of narrow jurisdiction but broad and liberal doctrines, and the Courts of Equity, with their vigorous and complete specific performance, have not been even touched in these pages.\*

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\* It would seem that we do not owe our doctrine of specific performance to the Roman law. "According to the principle, '*aliud pro alio invito creditori solvi non potest*,' the plaintiff by the civil law may, as a general rule, bring his suit for the specific performance which constitutes the object of a debt, and the court is to give its judgment, and to issue execution accordingly. Still, there being no other means of execution recognized by the later civil law than such as are directed against the debtor's property, a specific performance cannot be compelled except in the case of things due *in specie*, which, if requisite, are taken from the debtor forcibly (*manu militari*), while in all other cases, if the debtor refuses to obey the execution can only be directed against his property. The latter is done, either by sale at auction of personal or real estate (even rights or claims) belonging to the debtor, for the purpose of satisfying the creditor by paying him off; or by ejecting the defendant and putting the creditor into possession (*exmissio et immisio*), so as to enable the creditor to pay himself by means of the possession and enjoyment of real estate, or so as to secure him through the debtor's claims or rights. See Gaius III., 168. fr. 176, D. 50, 16; fr. 18, § 4, D. 36, 1; fr. 17, § 2; fr. 44, D. 40, 4; fr. 36, D. 40, 12; fr. 68, D. 6, 1; fr. 15, D. 42, 1; fr. 8, D. 43, 4; const. 2, 7, C. 7, 68; fr. 5, § 6, D. 7, 6; fr. 12, D. 8, 5; fr. 4, § 1, D. 39, 2; fr. 15, D. 39, 1; const. un, C. 8, 6. Hence, if the specific object be lost or deteriorated, or if, for some reason or other, it cannot be produced by the debtor, its value (*estimatio*) is exacted; and the same is the case where the debtor is prevented from performing any act *purely personal*, or where its performance would be no longer of any use to the creditor, or where it is refused by the debtor altogether, or at the due period and in the due manner. For the Romans very justly regarded compulsion in such cases as inconsistent with personal freedom, and could not resolve to restrict the latter, when the creditor is amply protected by his right to full compensation for the non-fulfilment ('*si non facit debitor quod promissit, in pecuniam numeratam condemnatur, sicut evenit in omnibus faciendi obligationibus*'); and thus they adopted the principle, '*ad faciendum nemo praeceps cogi potest*.' And it would seem to be always safest and best to take the side of freedom and of the debtor, wherever there be a doubt. With regard to such acts, however, as may be performed by another person

We have here only examined the subject of redress as awarded by the courts of law, or, as it may strictly be termed, *legal* relief; and the general result of our inquiry will be, I think, that the compensation obtained by the process of litigation, is partial and irregular. Its partial or incomplete character arises from the imperfect nature of all human administration, and the impossibility to do more than approach correct results. Tribunals able to carry their inquiry beyond the reach of our investigation, to scan the motive of each act, to determine how much is due to malice, how much to neglect, and how much to honest incapacity, would be alone fit to make complete compensation in each particular instance. As our jurisprudence is administered, we must content ourselves with dividing the loss between the contending parties.

The irregularity of legal relief is a very different matter. This arises mainly, as it appears to me, from the technical character of our forms of action; and would be removed by their removal. When there shall cease to be two actions against an agent, one on the case and the other on the contract; when it shall no longer be possible to bring trover, trespass, or assumpsit, upon the same facts; when the suit for mesne profits shall

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as well as by the defendant himself, compulsion is applied, either by forcible fulfilment in his name and place (*e. g.* delivery of the thing adjudged and transfer of title), or by having some other person perform the act at the debtor's expense. Fr. 14, 63, 72; fr. 82, § 1; fr. 84, fr. 91, § 2; fr. 113, 114, D. 45, 1; fr. 3, D. 13, 3; § 4, J. 2, 20; fr. 71, § 8, D. 80; fr. 1, pr. D. 13, 1; fr. 13, § 1; fr. 15, § 10, D. 42, 1; const. 4, C. 4, 48.

"These principles are retained in the canon law, cap. 2, x. 3, 21, (*'Homo liber pro debito non tenetur (i. e. non pignatur), etsi res defuerint quæ possint pro debito adici;*') and so, too, with only a few modifications, in the French law. C. Civ. art. 1142-45, art. 1146, seq. C. Proc. art. 562, 780-805; C. Com. art. 636-38.

"According to the German law, on the other hand, the debtor may not only be compelled in case of a negative act (an omission promised or otherwise due), by means of fines gradually increased, but the German practice applies a direct or absolute compulsion by means of personal arrest, civil imprisonment, military watch placed in his dwelling, by taking him to a work-house, and even by whipping, also in all those cases where the specific performance of any obligation whatever is refused by the debtor, and cannot be made at his expense by another person, or where the debtor fails to perform merely from lack of good will. Yet, from what has been said above, it will be evident that it is altogether without any foundation that some older and later jurists have made the assertion, that the application of absolute compulsion to enforce any obligation, whether it have for its object a doing or giving, could be justified by the later Roman law." I am indebted for this note to the learning and courtesy of Dr. Kauffman. As to where compensation and damages are decreed in equity, see 2 Story's Equity Jurisprudence, ch. xix., § 794.

cease to be based on the fiction of a forcible entry; when the action for seduction shall no longer be grounded on a pretence of service—when anomalies of this kind shall have disappeared, then, and not till then, will it be easy to reduce the subject of relief to order, system, and harmony.

I am happy to find these views sustained by the opinion of a very accomplished judge, delivered in New York, since the abolition of the English system of pleading in that State: "The arbitrary distinctions which were permitted to flow from a difference in the forms of action are abolished, and the time has arrived when general and uniform rules upon the subject of damages, rules so just and comprehensive as to be susceptible of universal application, may be adopted."\*

There are, however, other irregularities entirely independent of the forms of action. Such are those connected with the questions, whether actual injury must in all cases be proved, or whether a suit at law may be brought, *quia timet*, as by a surety, who has given his note for the principal's debt; the discrepancy between suits on warranties of chattels, where the price paid is only evidence of the value, and on sales of land, where the consideration money is the absolute limit of recovery; the contradiction between the rule in trover, where the value is taken at the time of the conversion, and on sales of chattels, where, if the price is paid, the damages are estimated at the day of trial. These difficulties, and others which we have noticed in the course of the preceding pages, can only be removed either by decisions pronounced after a careful survey of the whole subject, and with a view to a complete classification of this branch of the law; or by legislative interference.

The importance of fixed rules in this branch of jurisprudence, cannot be overrated. Where the law and the facts are disposed of by the same persons, as under the civil law, no particular evil, perhaps, results from the exercise of an arbitrary authority over the subject of compensation. But where, as with us, the cognizance of matters of fact is separated from that of the questions of law, and where the arbiters of the former are declared incompetent to pass upon the latter, to give them an uncontrolled discretion over the amount of relief

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\* Suydam vs. Jenkins, 8 Sandford, 646, per Duer, J.



would lead to incalculable mischief and confusion.\* "It is desirable," say the Supreme Court of Massachusetts, "to have as definite and precise rules on the subject of damages as are practicable."† "A proper administration of justice," says the Supreme Court of Louisiana, "requires that the rules established by law for the assessment of damages should be adhered to."‡ The judicial authority to settle legal questions would be utterly nugatory, if the amount of compensation were a mere matter of arbitrary discretion with the jury; and hence, the settled tendency of our law, as well as of all sound reasoning on the subject, is to reduce the measure of damages as far as possible to fixed legal rules, excepting only in those cases of flagrant outrage where the law steps in not merely to compensate but to punish.

And here I cannot better close this volume than by adopting the words used by old Molinæus, in terminating his discussion of the same subject; "*Jam tempus est manum tollere de tabula, et reliqua quæ plura occurrunt, suis locis reservando, finem huic syntagmati imponere.*" §

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\* For a very able discussion of the relative powers and duties of court and jury under our system, see *Commonwealth vs. Porter*, 10 Metcalf, 263, and many cases there cited.

† *Batchelder vs. Sturgis*, 3 Cush., 201.

‡ *Arrowsmith vs. Gordon*, 3 La. Ann. R., 105.

§ Dumoulin, *De eo quod Int.*, § 219.

## APPENDIX NO. I.

FROM THE LAW REPORTER FOR APRIL, 1847.

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### THE RULE OF DAMAGES IN ACTIONS EX DELICTO.

WE confess ourselves of the number of those who have supposed that the term *damages*, in the law of remedy, meant “a *compensation for some injury sustained*.” It is said to be “the *indemnity* given by law, to be recovered from the wrongdoer, by the person who has sustained the injury.” The plaintiff, in his declaration sets forth the wrong done, not to the public, but to himself; and concludes with fixing a sum, called the *ad damnum*, as the extent of the injury which *he*, and not the community, has sustained. Beyond this sum the jury cannot assess damages, be the outrage to the public ever so great. The defendant, by pleading the general issue, avers that he is not guilty of doing the wrong alleged; and this issue involves not only the principal act done, but all the circumstances accompanying it, and whatever tended either to give character to the transaction, or to show its injurious results to the plaintiff. We supposed that the plaintiff could no more in this than in any other action, give evidence of any facts other than those involved in the issue; namely, facts showing the nature of the wrong, and its consequences to himself; and that, if he could not be permitted to prove that, besides the injury to himself, the act was injurious or offensive to his neighbor B., neither could he show that it was injurious to the rest of his neighbors, nor to the whole state. The judge would tell him that B. was competent to sue for himself. So the state is competent to vindicate its own wrongs. The plaintiff, it is true, would not be confined to the proof of actual pecuniary loss; for it has been always held that the jury might take into consideration every circumstance of the act which injuriously affected the plaintiff, not only in his property, but in his person, his peace of mind, his quiet and sense of security in the enjoyment of his rights; in short his happiness. But it must affect *his* happiness, not his neighbor's; and therefore to this question, alone, it has been supposed, the jury ought to be restricted. These

views are in accordance with the law as stated in 2 Greenleaf on Evidence, §§ 253, 254, 256, 266, 272.

It is true that judges have frequently spoken of "exemplary" and "vindictive" damages, and of "smart-money;" but without ever instructing the jury, in terms, that they were at liberty to increase the damages purely for the sake of punishing the defendant, and beyond the amount of injury, taken in a liberal sense, which the plaintiff had sustained.

Recently, however, in the valuable Treatise on the Law of Damages, which Mr. Sedgwick has given to the profession, the learned author has denied the soundness of the general rule as we have above stated it, laying down the broad proposition that, "wherever the elements of fraud, malice, gross negligence, or oppression, mingle in the controversy, the law instead of adhering to the system or even the language of compensation, adopts a wholly different rule. It permits the jury to give what it terms punitive, vindictive, or exemplary damages; in other words, blends together the interest of society and of the aggrieved individual, and gives damages *not only to recompense the sufferer, but to punish the offender.*" (*Sedgwick on Damages*, p. 39.) However this view may seem justified by the general language of some judges, and by remarks gratuitously made in delivering judgment on other questions, it is not supported to that extent by any express decision on the point, and is deemed at variance not only with adjudged cases, but with settled principles of law. This will be apparent from an examination of the authorities on which the learned author relies. In the first case cited in support of his position, that of *Huckle vs. Money*, (2 Wils. 205,) which was an action to try the legality of an arrest under a general warrant issued by the secretary of state, the jury found a verdict for £300, which the defendant moved the court to set aside as excessive. But the motion was denied, on the ground that the damages were properly left at large to the jury; with instructions that they were not bound to any certain rule, but were at liberty to consider all the circumstances of oppression and arbitrary power by which the great constitutional right of the plaintiff was violated, in this attempt to destroy the liberty of the kingdom. All which the jury were thus permitted to consider, were circumstances going in aggravation of the injury itself which the plaintiff had received, and so were admissible under the rule as stated in 2 Greenl. on Evid. §266, 272. The case of *Tullidge vs. Wade* (3 Wils. 18,) was of the same class. It was trespass for breaking and entering the plaintiff's house, and debauching his daughter; and the jury were instructed to take into consideration the plaintiff's loss of her service, and the expenses of her confinement in his house. The verdict, which was £50, was complained of as excessive; but the court thought otherwise, "*the plaintiff having received this insult in his own house, where he*

had civilly received the defendant, and permitted him to make his addresses to his daughter." And it was observed by Bathurst, J., that "in actions of this nature, and of assaults, *the circumstances* of time and place, when and where *the insult* is given, require different damages; as it is a *greater insult* to be beaten upon the Royal Exchange, than in a private room." It thus appears, that in this case the damages were limited to the extent of the *injury received by the plaintiff*; and that the loose remark of Wilmot, C. J., relied on by the learned author, was altogether *gratis dictum*. In *Doe vs. Filliter*, (13 M. & W., 47,) which was trespass for mesne profits, the only question was, whether, in estimating the costs of the ejectment, as part of the plaintiff's damages, the plaintiff was confined to the costs taxed, or might be allowed the costs as between attorney and client. The remark of Pollock, C. B. respecting "what are called vindictive damages," though wholly uncalled for, is explained by himself to mean only that the jury may "take all *the circumstances* into their consideration;" namely, the circumstances of *the injury inflicted*, so far as they affected the plaintiff. The like may be observed of what Mr. Justice Washington said, in *Walker vs. Smith* (1 Wash., C. C. R., 152); which was an action against the plaintiff's factor, to recover the balance due to the plaintiff for goods which the factor had sold without taking collateral security, in violation of orders, the purchaser proving insolvent, and partial payment only having been obtained. The question was, whether the jury might assess damages in their discretion, for less than the plaintiff's actual loss, taking into consideration all the favorable circumstances on the defendant's part; or whether they were bound to give the plaintiff the precise sum which he had lost by the violation of his orders. And the judge instructed them that the latter was the sole measure of damages; remarking, passingly, that in suits for vindictive damages, the jury acted without control, because there was no legal rule by which to measure them. His meaning apparently was, that in actions "sounding in damages," the court had *no control* over the sound discretion of the jury; but that where the damages were susceptible of a fixed and certain rule, the jury were bound by the instructions of the court. The case of *Tillotson vs. Cheetham*, (8 Johns., 56,) is also relied upon. This was case for a libel, in which the jury were instructed by Kent, C. J., "that the charge contained in the libel was calculated not only to *injure the feelings* of the plaintiff, but to *destroy all confidence in him* as a public officer; and in his opinion demanded from the jury exemplary damages, as well *on account of the nature of the offense charged* against the plaintiff, as for the *protection of his character as a public officer*, which he stated as a strong circumstance for the increase of damages;" adding, "that he did not accede to the doctrine that the jury ought not to punish the defendant, in a civil suit, for the pernicious

ous effects which a publication of this kind was calculated to produce in society." Here the grounds of damages, positively stated to the jury, were expressly limited to the degree of *injury to the plaintiff*, either in his feelings or in his character, as a public officer. The rest is mere negation. The jury were not instructed to consider any other circumstances than those which affected the plaintiff himself; though *these*, they were told, demanded exemplary damages. In this view, all damages, in actions *ex delicto*, may be said to be *exemplary*, as having a tendency to deter others from committing the like injuries. These instructions, also, were in perfect accordance with the rule already stated. In support of them, the chief justice relies on *Huckle vs. Money*, and *Tullidge vs. Wade*. He also refers to *Pritchard vs. Papillon*, (3 Harg. St. Tr., 1071; 10 Howell St. Tr., 319, 370, S. C.), which was essentially a controversy between the crown and the people, before "the infamous Jeffries," who told the jury that "the government is a thing that is infinitely concerned in the case, that makes it so popular a cause," and pressed them, with disgraceful zeal, to find large damages for that reason, and for their compliance in finding £10,000, which was the amount of the *ad damnum*, he praised them as men of sense, to be greatly commended for it. The ruling of that judge, in favor of the crown, will hardly be relied upon, at this day, as good authority. But in *Tillotson vs. Cheetham*, the learned chief justice, in saying that the actual pecuniary damages in actions for tort, are never the sole rule of assessment, probably meant no more than this, that the jury were at liberty to consider all the damages accruing to the plaintiff from the wrong done, without being confined to those which are susceptible of arithmetical computation. The remark of Spencer, J., beyond this, was extrajudicial. In *Woert vs. Jenkins* (14 Johns., 352), which was trespass for beating the plaintiff's horse to death, with circumstances of great barbarity, the jury were told that they "had a right to give *smart-money*;" by which nothing more seems to have been meant, than that they might take into consideration the circumstances of the cruel act, as enhancing the injury to the plaintiff, by the laceration of his feelings. In the *Boston Manufacturing Company vs. Fiske* (2 Mason R., 119), the only question was whether, in case for infringing a patent, the plaintiff might recover, as part of his actual damage, the fees paid to his counsel for vindicating his right in that action. The observations of the learned judge, quoted by Mr. Sedgwick, were made with reference to the practice in admiralty, in cases of marine torts and prize, where a broader discretion is exercised than in courts of common law, the court frequently settling in one suit, all the equities between the parties in regard to the subject-matter.

The next case adduced is that of *Whipple vs. Walpole*, (10 N. Hamp. R., 130,) which was case against the town of Walpole, to recover damages

for an injury arising from the defective state of a bridge which the defendants had grossly neglected to keep in repair. The bridge had broken down while the plaintiff's stage-coach was passing over it, in consequence of which his horses were destroyed. The jury were instructed "that for ordinary neglect the plaintiff could not recover exemplary damages; but that such damages might be allowed in the discretion of the jury, in case they believed there had been gross negligence on the part of the defendants." The question seems in fact to have been, whether the jury were confined to the value of the horses, or might take into consideration all the circumstances of the injury. The sole question before the court in bank was, whether the above instruction was correct; and they held that it was. The remark that the jury might give "damages *beyond the actual injury sustained*, for the sake of the example," though gratuitous and uncalled for, seems qualified by the subsequent observation that the jury, in cases of gross negligence, "were not bound to be *very exact* in estimating the amount of damages;" and probably the learned judges meant to say no more than that, in such cases, the court would not control the discretion of the jury, but would leave them at liberty to consider all the circumstances of the injury, and award such damages as they thought proper. In *Linsley vs. Bushnell*, (15 Conn. R., 225,) which was a case for an injury to the plaintiff's person, occasioned by an obstruction left in the highway by the wanton negligence of the defendant, the question was, whether the jury, in the estimation of damages, were restricted to the loss of the plaintiff's time, and the expenses of his cure, &c., or might also allow, as part of his damages, the necessary trouble and expenses incurred in the prosecution of his remedy by action. And the court held that these latter were fair subjects for their consideration. "The circumstances of aggravation or mitigation," said the court,—*"the bodily pain; the mental anguish; the injury to the plaintiff's business and means of livelihood, past and prospective; all these, and many other circumstances, may be taken into consideration by the jury, in guiding their discretion in assessing damages for a wanton personal injury. But these are not all that go to make up the amount of damage sustained. The bill of the surgeon, and other pecuniary charges, to which the plaintiff has been necessarily subjected by the misconduct of the defendant, are equally proper subjects of consideration."* And it is in express reference to the propriety of allowing the trouble and expense of the remedy, that the observation respecting vindictive damages, or smart-money, quoted by Mr. Sedgwick, seems to have been made. For the learned judge immediately cites in support of his remark certain authorities, which will hereafter be mentioned, not one of which warrants the broad doctrine which is now under consideration; and he concludes by quoting from one of them, with emphasis, the admission that "where an

important right is in question, in an action of trespass, the court have given damages to *indemnify the party for the expense of establishing it.*" This is conceived to be the extent to which the law goes, in civil actions for damages, beyond the circumstances of the transaction.

The learned author further observes, that the doctrine he lays down has been fully adopted by the supreme court of the United States, and cites *Tracy vs. Swartwout*, (10 Peters R., 80.) That was an action of trover against a collector of the revenue, for certain casks of syrup of sugar-cane, which the importer had offered to enter and bond at the rate of fifteen per cent. *ad valorem*, but the collector, acting in good faith, required bond for a duty of three cents per pound. The importer refusing to do this, the goods remained in the hands of the defendant a long time, waiting the decision of the secretary of the treasury; who being of opinion that the lighter duty was the legal one, they were accordingly delivered up to the importer at that rate of duty; but in the mean time had become deteriorated by growing acid. The judge of the circuit court instructed the jury that the circumstances of the dispute ought not to subject the collector to more than nominal damages; to which exceptions were taken. The sole question on this subject was whether the plaintiff was entitled to the damages he had *actually sustained*; and the supreme court held that he was so entitled. It was in reference to this question only, that the terms *exemplary* and *compensatory* damages were used; the question whether, in any case, damages could be given by way of punishment alone, not appearing to have crossed the minds either of the judges or the counsel.

The last case cited by the author is that of the *Amiable Nancy* (3 Wheat., 546), which was a libel for a marine tort, brought by neutrals against the owners of an American privateer, for illegally capturing their vessel as prize, and for plundering the goods on board. The question was, whether the *owners* of the privateer, not having in any respect participated in the wrong, were liable for any damages beyond the prime cost or value of the property lost, and in case of injury, for the diminution in its value, with interest thereon; and the court held that they were not; and accordingly rejected the claim for all such damages as rested in mere discretion. To what extent the immediate wrongdoers might have been liable, was a question not before the court; yet it is to be noted, that, in the passing allusion which the learned judge makes to their liability, he merely says that, in a suit against them, it *might* be proper to go yet farther, in the shape of exemplary damages, but does not say that it *would* be.

From this examination of all the authorities adduced by this learned author in support of the position that, in the cases alluded to, damages may be given purely by way of punishment, irrespective of the degree and circumstances of injury to the plaintiff, it is manifest that it has not

the countenance of any express decision upon the point, though it has the apparent support of several *obiter dicta*, and may seem justified by the terms "exemplary damages," "vindictive damages," "smart-money," and the like, not unfrequently used by judges, but seldom defined. But taken in the connection in which these terms have been used, they seem to be intended to designate in general those damages only which are incapable of any fixed rule, and lie in the discretion of the jury; such as damages for mental anguish, or personal indignity and disgrace, &c., and these, so far only as the sufferer is himself affected. If more than this was intended, how is the party to be protected from a double punishment? For after the jury shall have considered the injury to the *public* in assessing damages for an aggravated assault, or for obtaining goods by false pretences, or the like, the wrongdoers are still liable to indictment and fine, as well as imprisonment, for the offense.

This view of the true meaning of those terms was taken by Smith, J. in *Churchill vs. Watson*, (5 Day R., 144.) It was trespass *de bonis asportatis*, committed with malice, and with circumstances of peculiar aggravation, to prevent the plaintiff from completing a contract for building a vessel. And the question was, whether the jury were confined to the value of the property taken, and presumptive damages for the force only; or whether they might consider all the aggravating circumstances attending the trespass, and the plaintiff's actual damage sustained by it. The court held the latter. The learned judge remarked that "in actions founded in tort, the first object of a jury should be to remunerate the injured party for all the real damage he has sustained. In doing this, the value of the article taken or destroyed forms one item: there may be others; and in this case I think there were others." He then mentions the interruption and delay which occurred in building the vessel, as of the class of damages to which he alludes, and adds that he shall not attempt to draw the line between consequences which may properly influence a jury in assessing damages, and those which are so far remote and *dependent on other causes* that they cannot be taken into consideration. "In addition," he observes, "to the *actual* damage" (meaning doubtless, from the connection, the direct pecuniary damage above alluded to), "which the party sustains in actions founded in *tort*, the jury are at liberty to give a further sum, which is sometimes called *vindictive*, sometimes *exemplary*, and at other times *presumptive* damages. These, from their nature, cannot be governed by any precise rule, but are assessed by the jury, upon a *view of all the circumstances attending the transaction*." He afterwards says, "Indeed I know of no such thing as *presumptive* damages for *force*. It is a wrong for which the law presumes damages; and the amount will depend on the *nature, extent, and enormity of the wrong*; but force par-



takes not of the nature of right or wrong, in such a manner that the law can raise any presumption." A similar view of the rule of damages in *torts* had previously been taken by the court in *Edwards vs. Beach* (3 Day R., 447), which was trespass for destroying a tavern-keeper's sign; the plaintiff claiming damages *commensurate with the injury*, and the defendant resisting all but the value of the sign. So, in *Denison vs. Hyde* (6 Conn. R., 508), which was trespass for carrying away the plaintiff's vessel, the rule was held to be, that in tort, "not only the direct damage, but the probable or inevitable damages, and those which result from the aggravating circumstances attending the act, are proper to be estimated by the jury." So in *Treat vs. Barber* (7 Conn. R., 274), which was trespass, the defendant having broken open the plaintiff's chest containing her wearing apparel, and used language in relation to the contents of it that wounded her feelings; it was held that these circumstances were proper to be considered by the jury, *as aggravating the injury*, and so increasing the damages. In *Merrills vs. The Tariff Man. Co.* (10 Conn. R., 334), which was an action on the case, the court referred to the malice, wantonness, and spirit of revenge and ill will, with which the act was done, and observed that "these circumstances of aggravation may, with great propriety be considered, in fixing the remuneration to which the plaintiff is entitled." It seems superfluous to state at large the particular cases in which a similar rule has been laid down. It was emphatically but briefly stated by Williams, C. J., in *Bateman vs. Goodyear* (12 Conn. R., 580), which was trespass for an aggravated forcible entry, in these words: "What, then, is the principle upon which damages are given, in an action of trespass? The party is to be indemnified for what he has actually suffered; and then all those circumstances which give character to the transaction, are to be weighed and considered." He cites the above case of *Churchill vs. Watson*, and refers to *Bracegirdle vs. Oxford* (2 M. & S., 77), where the circumstances of the entry into the plaintiff's house, namely, upon a false charge of concealment of stolen goods, to the injury of her reputation, were held proper for the consideration of the jury; Le Blanc, J. remarking, that "it is always the practice to give in evidence the circumstances which accompany and give a character to the trespass." The party is to be indemnified, nothing more. But every circumstance of the transaction, tending to his injury, is to be considered. At this limit the jury are to stop. They may weigh every fact which goes to his injury, whether in *mind, body, or estate*; but are not at liberty to consider facts which do not relate to the injury itself, nor to its consequences to the plaintiff. In other words, they cannot go beyond the issue, which is the guilt of the defendant, and the damage it did to the plaintiff; for this only did the defendant come prepared to meet. Such, plainly, was the

principle of the decision in the cases already cited; as it also was in *Hall vs. Conn. R. Steamboat Co.*, (13 Conn. R., 320), which was case for an inhuman injury to a passenger; in *Southard vs. Rexford*, (6 Cowen R., 254,) which was for breach of a promise of marriage; in *Major vs. Pulliam*, (3 Dana R., 582,) which was trespass *quare clausum fregit*; and in *Rockwood vs. Allen* (7 Mass., 254), which was case for the default of the sheriff's deputy. In all these cases there were circumstances of misconduct and gross demerit on the part of the defendant, richly deserving punishment in the shape of a pecuniary *mulct*, and fairly affording a case for damages on that ground alone; yet in none of them do the court intimate to the jury that they may assess damages for the plaintiff to any amount more than commensurate with the injury which he sustained.

The most approved text-writers, also, justify this rule of damages. Thus, Blackstone, (2 Bl. Comm., 438), defines *damages* as the money "given to a man by a jury, as a *compensation or satisfaction for some injury sustained*; as for a battery, for imprisonment, for slander, or for trespass." Hammond, (Law of Nisi Prius, p. 38), limits the remedy, by an action of trespass, to the recovery of "*a condensation for the injury sustained.*" *Ib.* p. 43—48. And it is worthy of remark, that Chief Baron Comyns, in treating expressly of damages, nowhere intimates a power to assess them beyond this. (3 Com. Dig. Damages, E.)

It was solely upon this ground of compensation to the plaintiff, for the injury to his feelings by the very insulting conduct of the defendant, that the verdict was held good in *Merest vs. Harvey*, (5 Taunt., 442.) Lord Kenyon has sometimes been quoted as having said that though a plaintiff may not have sustained an injury by adultery, to a given amount, yet that large damages, for the sake of public example, should be given. And this supposed opinion of his was alluded to in the case of *Markham vs. Fawcett*. But Mr. Erskine, who was for the plaintiff in that action, protested that "he never said any such thing." "He said that every plaintiff had a right to recover damages *up to the extent of the injury he had received*; and that public example stood in the way of showing favor to an adulterer by reducing the damages *below* the sum which the jury would otherwise consider as the lowest *compensation for the wrong.*" (2 Erskine's Speeches, p. 9.) The general rule, as thus limited, was recognized in *Gunter vs. Astor* (4 J. B. Moore, p. 12), where the defendants, who were rival manufacturers in the same trade with the plaintiff, had invited his company of servants to a dinner, got them intoxicated, and induced them to sign an agreement to leave the plaintiff's service and enter their own, which they did. The action was in case, for conspiracy; and Lord C. J. Dallas "left it to the jury to give damages *commensurate with the injury the plaintiff had sustained.*" A new trial was moved for, on the

ground that as the plaintiff's men worked by the piece only, and not by a contract on time, the plaintiff was entitled to damages only for the half day they spent at the dinner; whereas the jury had given £1,600, being the proved value of two years' profits. But the motion was denied, on the ground that the plaintiff was entitled to recover damages for the loss he actually sustained by their leaving him at that critical period, of which the jury were the proper and exclusive judges. Here was a case of gross fraud and aggravated wrong, particularly dangerous in a manufacturing community; and yet no one pretended that the plaintiff had a right to greater damages than he had himself sustained, however deserving the defendants might be of a heavy pecuniary *mult*, by way of example. See also *Sears vs. Lyons*, (2 Stark. R., 317,) which was trespass for breaking the plaintiff's close, and poisoning his fowls; where the jury were cautioned to guard their feelings against the impression likely to have been made by the defendant's conduct. In all these cases, there were "elements of fraud, malice, and oppression mingled in the controversy," yet the learned judges did in no case instruct or permit the jury to "blend together the interest of society and of the aggrieved individual, and give damages not only to recompense the sufferer, but to punish the offender;" which, if Mr. Sedgwick is correct, they ought to have done. Their omission to do this, most expressively teaches that they recognized no such rule of law.

The rule of damages, as limited by the extent of the injury to the plaintiff, was the same in the Roman civil law. See 1 Domat's Civil Law, p. 426, 427, b. 3, tit. 5, § 2, n. 8, and notes. Wood's Institutes of the Civil Law, b. 3, ch. 7, p. 258—264, and the cases there cited.

The broad doctrine stated by Mr. Sedgwick finds more countenance from the bench of Pennsylvania than from any other quarter which is known to us; and yet even there, it can hardly be said to have been adjudged to be the law, as may be seen by the cases decided. The earliest usually referred to, is *Sommer vs. Wilt*, (4 S. & R., 19,) which was an action on the case to recover damages for the malicious abuse of legal process, in which the jury found for the plaintiff, assessing damages at 9,500 dollars. The case came before the court in bank, on a motion to set aside the verdict, on the ground that the damages were excessive; but the motion was refused, for the express reason that "all the facts and circumstances" of the case "were fairly submitted to the jury, to draw their own conclusions;" and that "there were circumstances from which the jury might have inferred malice, and evidence which satisfied them that the ruin of the plaintiff was occasioned by an act of oppression, and many aggravating circumstances of useless severity." This case, therefore, is in strict accordance with the rule as we have stated it, the damages being

referred to the extent of the wrong done to the plaintiff. When, therefore, the learned judge, in the course of his judgment, remarked that the standard of damages in actions of that nature was "not even a matter of mere compensation to the party, but an example to deter others," the remark was not called for by the question before him, but was entirely extra-judicial. This case was cited, and its principle approved in *Kuhn vs. North*, (10 S. & R., 399, 340,) in which the court granted a new trial because of excessive damages, in an action against the sheriff, where he honestly intended to perform his duty, and the jury were plainly mistaken.

The strongest case in favor of giving damages to the plaintiff beyond what he has sustained, is that of *McBride vs. McLaughlin*, (5 Watts, 375,) which was trespass against a judgment creditor for a wilful and malicious abuse of process, in the levy of his execution against two joint debtors, "under circumstances of peculiar injustice and oppression." It appeared that the oppression was in fact meditated not against the present plaintiff, but against the other debtor, to whom the property taken was supposed to belong; and that the present plaintiff had been joined in the judgment by mistake; and it was set aside as to him. The question was, whether the defendant's malice and misconduct in the transaction could be taken into the estimation of damages, inasmuch as it was not intended against the plaintiff. The judge ruled that it might; and his ruling was sustained by the court in bank. There was no discovery of error or mistake by the creditor, and consequent apology, during the oppressive transaction; but the whole was carried out to its final consummation, in the most insolent and cruel manner. The case, therefore, falls within our rule, that the jury may consider all the circumstances affecting the plaintiff, either in mind, body, or estate, and award him damages to the extent of the injury done to *him* in either of those respects. Surely, if A. spits in B.'s face on 'change, it does not diminish the disgrace, nor, of course, the extent of the injury, for him afterwards to say that he mistook B. for C. The crowd that saw the indignity may never come to the knowledge of this fact, nor does it lessen the pain inflicted upon his feelings at the time. In both cases, as in all others, the evidence is confined to the principal fact, with all its attending circumstances, stamping its character, and affecting the party injured. In the case we have just cited, however, the learned judge does seem to place the decision of the court on the ground that in certain offenses against morals, which would otherwise pass without reprehension, "the providence of the courts," permits the private remedy to become an instrument of public correction. We say *seems* to place it; for he also uses expressions which equally indicate a reliance upon the rule which confines the jury to the evidence affecting

the plaintiff alone. Such, for example, is the concluding sentence of his judgment: "The defendant was guilty of *wilful oppression*, and he is properly punished for it." Oppression of whom? Clearly the plaintiff, and no other. Our limits will not permit an extended examination of all that fell from the court on this occasion; but with the profound respect we sincerely entertain for that learned bench, we may be allowed to question the accuracy of the assertion, that in an action for seduction of a daughter, the loss of services is the only legal ground of damages to the plaintiff. It is true, it was stated by Lord Ellenborough in 1809, to be difficult to perceive the legal propriety of extending the rule beyond that; yet he confessed the practice of so extending it had become inveterate; and accordingly he instructed the jury also to consider the injury to the plaintiff's parental feelings; and the rule has for many years been well settled, that in this, as in other wrongs, the wounded feelings, the loss of comfort, and the dishonor of the plaintiff, resulting from the act of the defendant, form a legal ground of damages, as part of the transaction complained of. The grounds of the action for seduction were recently examined in England, in *Griannel vs. Wells*, (7 M. & G., 1033,) and the damages explicitly admitted to be given as *compensation*; not limited, however, to the actual expenditure of the plaintiff's money, but given according to all the circumstances of aggravation in the particular case. These are consequences of the defendant's wrongful act, done to the plaintiff, to his injury; and it is for these, and not for the outrage to the public, that damages are given. See 2 Greenl. on Evidence, and cases there cited. *Andrews vs. Askey*, (8 C. & P., 7.) The case of *Benson vs. Frederick*, (3 Burr., 1845,) cited in *McBride vs. McLaughlin*, was not a case of damages given for the sake of example. It was an action against a colonel, for ordering a private to be whipped, out of spite to his major, who had given the man a furlough. The jury gave him £150; and the court refused to set aside the verdict for excessiveness of damages, because the man, "though not much hurt, indeed, was *scandalized and disgraced* by such a punishment."

In conclusion, it is worthy of remark, that afterwards, in *Wynn vs. Allard*, (5 Watts & Serg., 524,) which was trespass for a collision of vehicles on the road, the same learned court of Pennsylvania very properly held that the drunkenness of the defendant was admissible in evidence to determine the question of negligence, where the proof was doubtful; but "not to inflame the damages." Why not, if it was "an offense against morals"? For it certainly must have been deemed such an offense. And in *Rose vs. Story*, (1 Barr. R., 190, 197,) in trespass *de bonis asportatis*, where the jury had been allowed, in addition to the value of the property, to give such further damages, as "*under all the circumstances of the case*

as argued by the counsel, they might think the plaintiff entitled to demand;" the same court held the instruction wrong, as giving the jury "discretionary power, without stint or limit, highly dangerous to the rights of the defendant," and "leaving them without any rule whatever." It is against this discretionary and unlimited power, so liable to abuse, and so dangerous to the rights and liberties of the citizen, that we contend; though it is not for us, but for the judiciary, to declare what is the law.

G.

## APPENDIX NO II.

FROM THE LAW REPORTER FOR JUNE, 1847.

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### THE RULE OF DAMAGES IN ACTIONS EX DELICTO.

THE April number of the Law Reporter contains an able and elaborate article by Mr. Professor Greenleaf, re-asserting and defending the position originally adopted by Mr. Metcalf, the learned reporter of the supreme court of Massachusetts, in an article in the American Jurist (vol. iii. p. 387), that damages even in actions of tort must always be strictly limited to compensation; and this doctrine is also supported by the Journal in the editorial notice of Mr. Sedgwick's work on the Measure of Damages. To endeavor to maintain ground enfiladed by a cross-fire so formidable as this, may seem a rash undertaking; but disregarding the disparity of strength and numbers, let us address ourselves to the contest—a contest on which we enter with great diffidence as to our own powers, but an unwavering confidence in the strength of our position.

We will first examine the subject on authority, and after ascertaining how it stands in this respect, then look into the matter on principle. But for the purpose of better comprehending the precise nature of the question, let us see exactly what the conflicting propositions are. The doctrine of compensatory damages is thus briefly stated by Professor Greenleaf in his extremely valuable work on evidence: "The plaintiff is not entitled to receive compensation beyond the *extent of his injury*; nor ought the defendant to pay to the plaintiff more than the plaintiff is entitled to receive." (Greenleaf on Evidence, vol. ii. p. 209.)

This latter clause is ambiguous, and in one sense imports a mere truism; for it is very certain that the defendant *never does in fact* pay more than the plaintiff receives, and no more than he is entitled by law to receive. But the meaning of the phrase, as amplified and insisted upon in Mr. Greenleaf's recent article, is, that the plaintiff's recovery in all cases is limited strictly to *compensation*; not of course to mere compensation for mere pecuniary injury, but "for every circumstance of the act com-

plained of which injuriously affects the plaintiff, in his person, his peace of mind, his quiet and sense of security in the enjoyment of his rights; in short, his happiness."\* The damages must be *compensation* and nothing more. The counter doctrine is thus stated; "whenever the elements of fraud, malice, gross negligence, or oppression mingle in the controversy, the law, instead of adhering to the system or even the language of compensation, adopts a wholly different rule. It permits the jury to give what it terms punitive, vindictive, or exemplary damages; in other words, blends together the interest of society and the aggrieved individual, and gives damages not *only to recompense the sufferer but to punish the offender.*"† Of this doctrine, Mr. Greenleaf, in the article already referred to, says that though it may seem justified by the general language of some judges, and by "remarks gratuitously made in delivering judgment on other questions, it is not supported *by any express decision;*" and that "though judges have spoken of exemplary or vindictive damages, they have never instructed the jury *in terms* that they were at liberty to increase the damages merely for the sake of punishing the defendant, and beyond the amount of injury which the plaintiff had sustained." And it is perhaps worthy of notice, that so completely unauthorized does Mr. Greenleaf seem to consider this doctrine, that it is not alluded to in the chapter in his work on Evidence devoted to the subject of damages, nor would the idea even appear to have occurred to his mind.

We propose in the first place, without further preface, to see how far the above statement of the result of the adjudged cases is correct. The origin of the rule dates back to the time of Lord Camden, and the great controversy about general warrants. In *Wilkes' case* that great judge said, "As to the damages, I continue of the opinion that the jury are not limited by the injury received. Damages are designed not only as a satisfaction to the injured person, but likewise *as a punishment to the guilty*, and as proof of the detestation in which the wrongful act is held by the jury."‡ In New York the doctrine is as old as the case of *Cheetham vs. Tillotson*, (3 J. R., 56.) There the charge of the chief justice was, that "the case demanded exemplary damages, as well on account of the nature of the offense charged against the plaintiff, as for the protection of his character as a public officer, which he stated as a strong circumstance for the increase of damages, and *that he did not accede to the doctrine that the jury ought not to punish the defendant in a civil suit for the pernicious effect which a publication of this kind was calculated to produce in society.*"

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\* Greenleaf on Evidence, Vol. ii., 219. Law Reporter for April, 1847, 580.

† Sedgwick on Damages, 39.

‡ Lord Campbell's Chancellors, vol. v. 240.



And to this precise point the defendant's exceptions were addressed. "The charge of the judge," they say, "was incorrect in stating that the plaintiff was entitled to exemplary damages, on account of the injurious tendency of said publication to the country. *In a private action the party can recover only for the private wrong ; he has no concern as to the public offense, for which the defendant must atone by an indictment.*" This, it will be noticed, is precisely the doctrine of Mr. Metcalf and Professor Greenleaf. Now what did the court say? Kent, C. J., re-affirmed the doctrine of his charge, and Spencer, J., said; "In vindictive actions, such as for libels, defamation, assault and battery, false imprisonment, and a variety of others, it is *always in charge to the jury that they are to inflict damages for example-sake, and by way of punishing the defendant.*" How is it possible to call this language, as Mr. Greenleaf does, "extra judicial"? How can it be termed "a remark gratuitously made in delivering judgment on other questions"? In view of this case can it be safely said that "no jury has ever been told to give damages to punish the defendant?"

So, again, in the same State in a very recent case, *Cook vs. Ellis*, (6 Hill, 465,) of which Mr. Greenleaf takes no notice, where the defendant, having been punished criminally for assault and battery, it was insisted in an action brought for the same offense, that the fact of the conviction and punishment should be received in evidence to mitigate damages. The discussion it will be perceived, turns on the very same principle; and what said the supreme court in excluding the evidence? "We concede that smart-money, allowed by a jury, and fines imposed at the suits of the people, depend on the same principle. *Both are penal*, and intended to deter others from the commission of the like crime. The former, however, become incidentally compensatory for damages, and at the same time *time answer the purpose of punishment.*" Of this decision the learned author of the article in the Law Reporter takes no notice, and it certainly could not be very well called "a remark gratuitously made in delivering judgment on other questions."

How is it in Pennsylvania? In an action of trespass, *Bride vs. McLaughlin*, (5 Watts R., 375,) for selling under an execution under circumstances of peculiar injustice and oppression, Grier, president, who is now on the bench of the supreme court of the United States, said, "If the jury believe that the defendants acted in a deceitful, hard, cruel, or oppressive manner, they may give not only compensatory, but exemplary and vindictive damages." In error, this was denied to be law, and the counsel for the plaintiff in error cited 3 Am. Jur., 287, (the original article of Mr. Metcalf,) in support of the doctrine now insisted on. But the court said, "whatever be the speculative notions of fanciful writers, the authorities teach that damages may be given in peculiar cases *not only to compen-*

*sate but to punish.* There are offenses against morals to which the law has annexed no penalty as public wrongs, and which would pass without reprehension, did not the providence of the courts permit the *private* remedy to become an instrument of public correction." Is this too "a remark gratuitously made in delivering judgment on other questions"? How stands the law in the Pennsylvania circuit? In *Conard vs. Pacific Ins. Co.* (6 Peters, 272,) Mr. Justice Baldwin said, "when a trespass is committed in a wanton, rude, and aggravated manner, indicating malice or a desire to injure, a jury ought to be liberal in *compensating* the party injured in all he has lost in property, in expenses for the restoration of his rights, in feeling, in reputation; and even this may be exceeded *by setting a public example*, to prevent a repetition of the act." How clearly is the distinction here taken, and the rule for which we contend insisted on!

In New Hampshire the whole subject has been repeatedly considered. In trespass *de bonis asportatis* for a sleigh and horse, the defendant denied that he had committed any tort, and rested his argument upon his innocence of intention, and upon the existence of a bailment at the time he removed the property. Woodbury, J., said, "In respect to the intention, that is not, in cases of this sort, a subject of inquiry, *except to prevent vindictive damages*. In crimes, the intention is the essence of the charge; but in civil actions, the injury caused to the plaintiff is the essence of the charge, and whether committed through ignorance or malice, it is neither more nor less an injury caused to the plaintiff by the defendant. The intent of the party *may affect the damages*; and as the defendant appears not to have been actuated by any bad motive, nor to have sold or converted the sleigh to his own use, he should pay only *the actual injury* caused by the removal of the sleigh." *Sinclair vs. Tarbox*, (2 N. H. R., 135.) This recognizes the precise doctrine, that in civil cases, proper for vindictive damages, the amount of recovery varies with the intent of the defendant, and does not depend on the mere question of injury sustained. In an action for criminal conversation with the plaintiff's wife, the judge told the jury, "that in estimating the damages they should look, not only to the character and conduct of the plaintiff and his wife, to see what such a husband ought to *recover* for criminal conversation with such a wife, but to the conduct of the defendant, in order to determine what a person who had conducted as he had *ought to pay*,"—thus disregarding utterly and distinctly the notion, "that the defendant should not pay more than the plaintiff ought to receive." To this charge the defendant excepted on the ground "that it directed the jury that the damages might be imposed by the jury as a punishment," insisting that "however reasonable it may be that the defendant should be *punished* for his misconduct *when prosecuted by the State*, the plaintiff had no claim to profit by his degradation." But

of this opinion was not the court, saying, "after an attentive examination of the subject, we see nothing in the instructions given to the jury in relation to damages, which we think ought to have been otherwise." *Sawyer vs. Nelson*, (4 N. H. R., 501.) Is this "*gratis dictum*," "extra-judicial," or is it a "remark gratuitously made in delivering judgment in other cases"?

In a case in the same State, to recover damages for the loss of a horse, arising from defects in a bridge which the defendants were bound to repair, the court instructed the jury, that for ordinary neglect the plaintiff could not recover exemplary damages; but that such damages might be allowed in the discretion of the jury, in case they believed there had been gross negligence on the part of the defendants. In the report of the motion for a new trial, the arguments of counsel are not given, but the court cited *Woert vs. Jenkins*, (14 J. R., 353), *Tillotson vs. Cheatham*, (3 J. R., 57), *Huckle vs. Money*, (2 Wils., 205, 3 Wils., 10), concurred with the decisions in those cases, and said "the principle is thus established, that in actions for tort to the person and to personal property the jury may give liberal or exemplary damages in their discretion,—damages beyond the actual injury sustained, for the sake of the example; and the only remaining inquiry is, whether this case was proper for the exercise of that discretion." *Whipple vs. Walpole*, (10 N. H. R., 180.) Is this too a remark gratuitously made?

In Connecticut, it is certainly true, that in saying that "no principle is better established, and in practice more universal, than that vindictive damages, or smart-money, may be awarded by the verdict of juries," as the supreme court did in the cases of *Linsley vs. Bushnell*, (15 Conn., 225), *Huntly vs. Brown*, (15 Conn., 267,) this language was not absolutely necessary for the case before them; but it is equally true, that before pronouncing this language, they had, as will appear by the report, examined the cases on which the doctrine of vindictive damages rests, and that they adopted the principle of those decisions. We suppose that if the inquiry were pursued, similar adjudications might be found in almost every State of the Union. Thus in Illinois, in an action to recover damages for seduction of a daughter, it was insisted that the father could only recover the damages sustained by loss of service and expenses; but it was held that the jury might award him compensation for the dishonor and disgrace cast upon him and his family, and for the being deprived of the society and comfort of his daughter, the court saying, "in vindictive actions, and this is now regarded as one, the jury are always permitted to give damages for the double purpose of setting an example and of punishing the wrong doer." *Grube vs. Margrave*, (8 Seammon, 373.) So again, in the same State, in an action of trover brought for a horse, it ap-

peared that the defendant, being bailee of the animal to be agisted and fed, used the horse for his own purposes without leave. The horse died a few hours after the unauthorized use, but not in consequence of the using. It was held by the supreme court, in error, that there being no proof of actual damage, they would not set aside a verdict which had been rendered for the defendant. Application being made for a new trial, they refused it, saying "that as the value of the horse was not sought by the proof, the only damages that could be recovered would be in the nature of smart-money for the wrongful use, which *must be in their nature vindictive, as there is no proof of special damages or injury.* And it is a rule that courts will not grant new trials where vindictive damages only are sought to be recovered, or merely nominal damages." *Johnson vs. Weedman*, (4 Scammon, 495.) Now, it is perfectly true, that in this as in some of the other cases, the present question was not necessary to be decided; but at the same time it is equally clear that the court had considered it, and had made up its mind on it.\*

We confess ourselves utterly at a loss how, in the face of these decisions, the very learned and acute author of the work on Evidence can say that the rule of vindictive damages, for the purpose of punishment, is not supported by any express decision. We suppose, on the contrary, that in the four States of New York, New Hampshire, Connecticut, and Pennsylvania, the point is so conclusively settled as not to admit of argument. We venture to assert, in New York at least, that this is strictly so. Independent of these decisions, the whole current of authority, and the very nomenclature of the law, require the doctrine for which we contend. What do the supreme court of the United States mean in the case of *Tracy vs. Swartwout*, (10 Peters, 81,) by laying stress on the difference between compensatory and exemplary damages? Surely words mean something. *Compensatory* damages must be for compensation. *Exemplary* damages are something different. What are they? The new doctrine requires a radical change in the terminology of the law. The learned author of the work on Evidence denies assent to any but decisions expressly on the point, and treats all other as extra judicial, *gratise dicta*, or as "gratuitous remarks made in delivering judgment on other questions." It is admitted, in the article in this journal, above cited, that the doctrine of vindictive damages has been recognized by several eminent judges, but their opinions are called, "gratuitous, extra-judicial," "passing allusions," &c. We beg leave to ask whether the contrary doctrine can find even a "gratuitous, extra-judicial or passing remark," from the bench in its favor. We know it is constantly said, in general, that

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\* See, also, *McNamara vs. King*, 2 Gilman, (Hb.) 492.

damages are intended for compensation ; very loose language, at the best, for no verdict ever compensated for the entire injury ; but has it ever been decided or suggested, by any judge of any court, that a jury cannot, in actions *ex delicto*, give damages by way of punishment beyond the line of compensation ?

As to the principle of the matter, the learned author of the work on Evidence, and the editor of the Law Reporter, seem both to be of opinion that there is and can be a clear, complete line of division drawn between the public and private interest ; indictments being provided for the body social, and suits for the individual. To our minds this division seems entirely fanciful and imaginary. How is it possible so to divide the community and the individual ? In organizing civil courts of justice, how much does the legislator take into regard the fact, that social order depends on controversies being adjusted by the public authorities ! In *qui tam* actions, how clearly are the public and private interests blended ; in all cases of misdemeanors, how manifestly is the party offending subjected to a double pecuniary punishment, first by verdict, and next by fine ! What difference does it make, whether the verdict was for compensatory or vindictive damages ? If the verdict is for compensation, and the party injured is completely compensated, what remains of public offense ? We apprehend that the suit, in cases which are also punishable by indictment, is a mere cumulative remedy. Surely there is nothing contrary to principle in this view of the case. But there is a very numerous class of cases of reckless negligence and gross fraud, not amounting to criminal offenses, and in which, if the plaintiff is to be limited to compensation, no *punishment*, as such, can ever be inflicted. Is this desirable for the purposes of social order ? Does the cold doctrine of compensation, in cases of this description, satisfy the *heart* of jurisprudence ?

The most serious difficulty, however, occurs in the practical application of Mr. Greenleaf's rule. How is the party to arrive at the measure of compensation ? How is the jury to get at remuneration for loss of honor, loss of credit, wounded feelings, injured sensibilities ? If it is difficult to minister to a mind diseased, who is to compensate a mind exasperated ? What is the rule ? What is the standard ? Would not a jury, solemnly charged in an action of trespass that they must limit the damages to compensation,—that they must give not a cent more, not a farthing less,—that it must be the pound of flesh, and not a drop of blood—would they not be utterly lost in a metaphysical maze ? How are feelings, character, social position, to be estimated in dollars and cents ? The old puzzle—"if a pair of andirons cost a dollar, how much would a load of wood come to ?" is a practical and intelligible proposition, compared to measuring mental injury by the standard of strict pecuniary compensation. Again,

suppose the doctrine established that the jury are to confine themselves to compensation, how is to be *enforced*? Necessarily by the court. But this certainly cannot be done; on the contrary, the authorities are clear, and the learned author of the work on Evidence, in the article in this journal already cited, admits, that the court have no power over the subject unless the damages are so gross as to raise a suspicion of partiality or passion. So says Mr. Justice Story, *refusing* to set aside a verdict in an action of this class: "The damages are certainly higher than what, had I been on the jury, I should have been disposed to give; I should now be better satisfied if the amount had been less." *Thurston vs. Martin*, (5 Mason, 497.) See also *Duberley vs. Gunning*, (4 T. R., 851,) and a number of similar cases.\*

So that in adopting the rule of Mr. Greenleaf, we come to these practical conclusions: *First*, the jury are told that they are to give compensation, and nothing further; *secondly*, they are left without any standard whatever to measure the compensation; and *thirdly*, even if they go beyond the line of compensation, the court has no authority to interfere. The rule is without practical applicability and without any binding efficacy. We confess that, rather than rush into such contradictions, we prefer to take the law as we believe that we find it adjudged in England and in four of the most respectable States in the Union. As to "scraping off barnacles," by which poetical figure we are invited, by a learned critic in this journal, to disregard the positive language of the law, we suppose it would hardly add to the value of an Elementary Treatise, if, overleaping the express decisions of courts, it were to adopt a new rule, unsupported by any adjudged case, and environed by so many difficulties.

As to damages being *compensation*, the sooner the idea is got out of the head of a practical lawyer the better; damages are, in no just sense, compensation. In the most ordinary case of a suit on a note of hand, the damages do not amount to compensation. Who pays the counsel-fees? Who pays for the time of the plaintiff? Who pays for his annoyance and vexation? The most successful lawsuit is too often a Bar-mecide feast.

T. S.

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\* *Coffin vs. Coffin*, 4 Mass., 1. *Coleman vs. Southwick*, 9 J. R., 45. Com. Dig., Damages E, 7.



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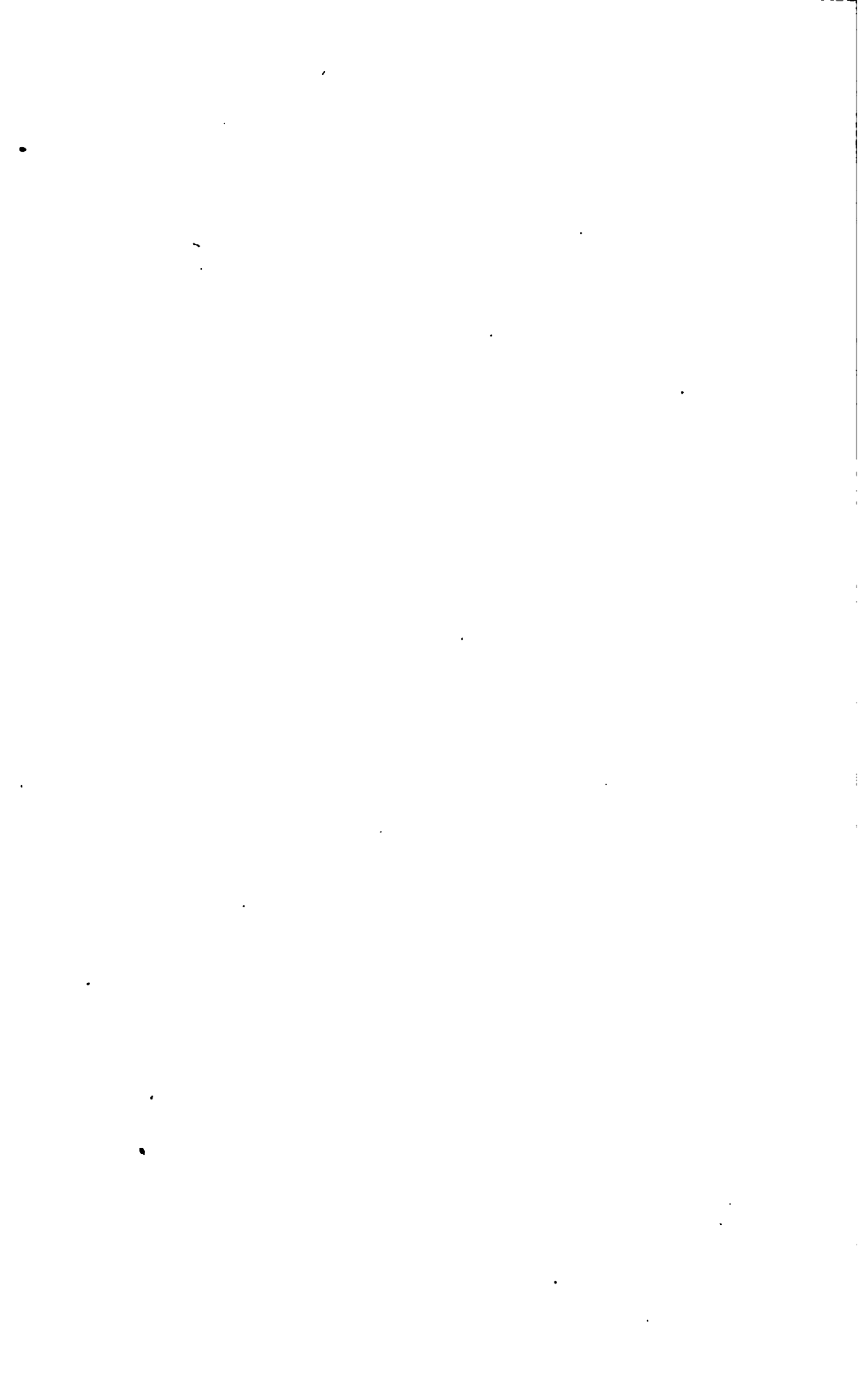
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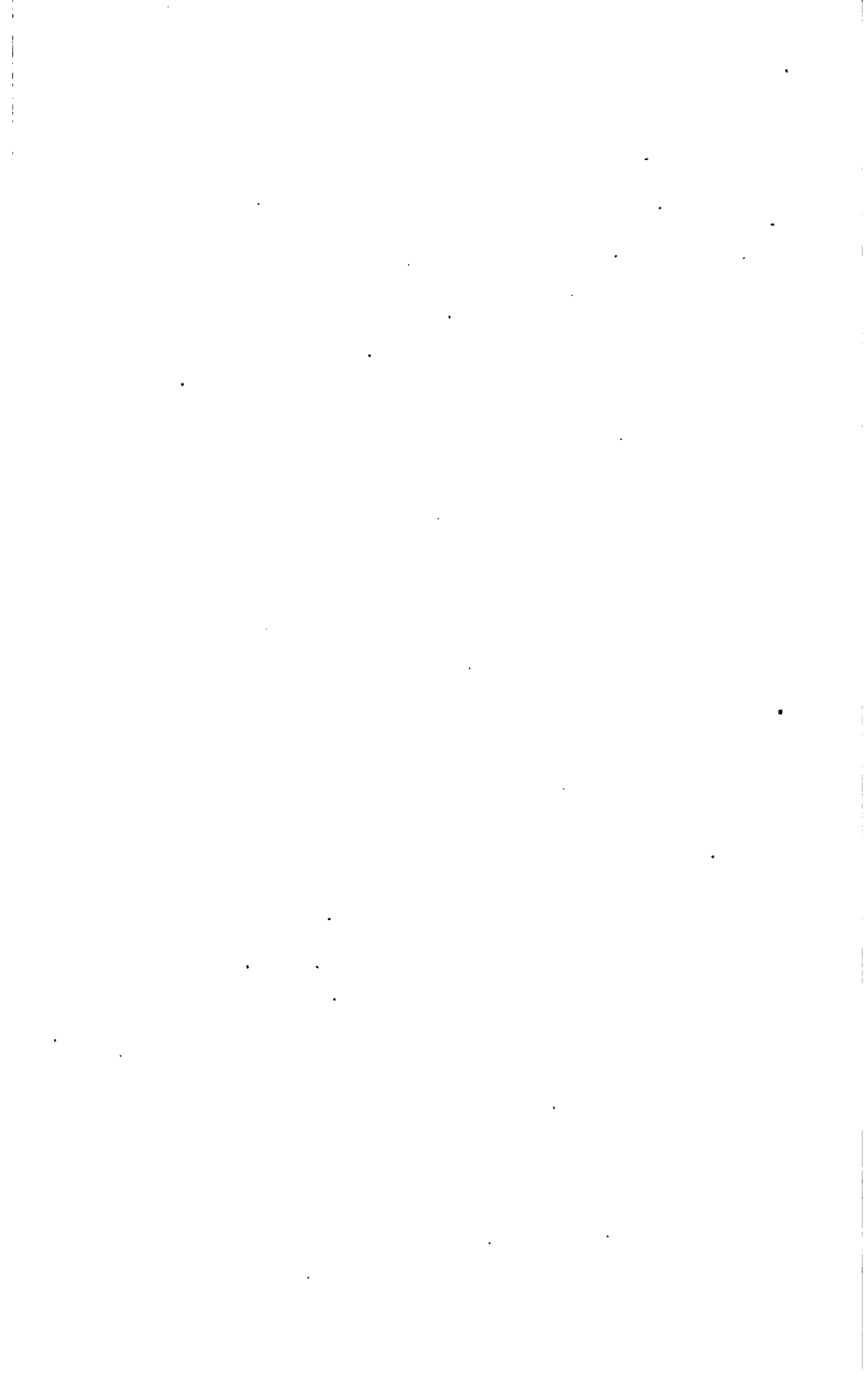
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